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Supreme Court of the United States

OCTOBER TERM, 1953

No. 207

CHARLES A. M. WATERHOUSE,
Petitioner,

vs.

EDWARD HOOVER; EDWARD HOOVER, Trustee of real estate for Charles B. Bosserman and Successors; EDWARD HOOVER, Executor of the Estate of Charles B. Bosserman; MT. HEALTHY FLYING SERVICE, INC., an Ohio corporation of Hamilton County, Ohio, Statutory Agent, Josef B. Rudolf; HOMER S. TOMS; ESTHER P. TOMS; FIFTH-THIRD UNION TRUST CO., of Cincinnati, a corporation under the laws of Ohio; POWEL CROSLEY, JR.; HESTER M. GUARD; DANIEL W. BEDINGER; THOMAS GUARD; ALICE WATERHOUSE HUGHES; MILLICENT WATERHOUSE; MARIE WATERHOUSE; ALICE GRIMM RUDOLF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner Charles A. M. Waterhouse, respectfully requests that you consider the matters set out herein, to the end that a writ of Certiorari may issue herein to the Sixth Circuit Court of Appeals for a review by this Court of the erroneous proceedings had and taken therein.

This Petition will be in four paragraphs, as follows:

FIRST: A statement of matters involved.

SECOND: Setting forth facts showing the jurisdiction of this Court.

THIRD: Legal questions involved.

FOURTH: Reasons relied upon for allowance of Writ summarized.

I.
STATEMENT OF MATTERS INVOLVED

Reduced to basic analysis there is one outstanding and controlling question involved, but there are five other incidental or subsidiary questions depending, partly at least, upon a correct solution of the principal question.

The controlling question is whether or not the proceedings had in a will contest filed on May 29, 1903, in the Court of Common Pleas in Hamilton County, Ohio, being Case No. 126,311, resulted in a VALID OR VOID JUDGMENT.

The five incidental or subsidiary questions will be stated in Paragraph No. 3.

The proceedings had in the will contest resulted in a purported judgment, finding the paper writing which had been theretofore probated by the Probate Court of that County as the Last Will of Hester P. Waterhouse, not to be in fact the Last Will of the testatrix.

Hester P. Waterhouse died testate on January 12th, 1901; her Will was probated May 31st, 1901, and at that time the period of limitations for contest of a probated will was two years.

The testatrix provided a life estate for her husband of one-ninth of all her real estate, with the remainder

to her eight children. However, between the date of the execution of her Will and her death, one daughter died, leaving only seven children, three sons, three married daughters and one single daughter. In her Will, she provided that each of her eight children (later seven) should receive exactly equal portions of her estate by taking into consideration advances already made, or thereafter to be made, to each child. She owned considerable real estate in three counties in Ohio, and provided in her Will that her Executors should have all her real estate appraised by impartial appraisers, and then add to the total appraised value of the real estate (other than devised to her husband) all advancements, and divide this sum equally between her children, and then, as far as possible, allot real estate at its previously appraised value to each child, and equalize the difference by one child giving to another a note and/or mortgage for final equalization.

However, it is provided in the Will as follows: (Record 29)

> (1) "I will that the legacies of my daughters, Mary Bosserman, S. Frances Bedinger and E. Perlie Smith, SHALL BE PUT IN TRUST FOR THEM and the net income from their respective shares of my Estate shall be paid to them respectively in semi-annual installments during their natural lives respectively."
>
> (2) "I appoint my son, John H. Waterhouse, as Trustee for these three daughters."
>
> (3) "If any or all of said daughters Mary Bosserman, S. Frances Bedinger and E. Perlie Smith, SHOULD NOT SURVIVE HER HUSBAND AND SHOULD LEAVE NO ISSUE, then I will that her share of my Estate shall be divided into eight equal parts, one of which parts

she may dispose of by Will, the other seven parts shall, as soon as convenient, be equally divided among her surviving brothers and sisters the children of any deceased brother or sister taking jointly the same share the parent would have taken if then living."

(4) "If she should make no Will said one-eighth shall go to her husband." (Emphasis and numbers ours).

Two other sentences in the Will become important, also, but for a different reason, and these two sentences are as follows:

(1)"I will that the heirlooms consisting of a silver tankard, silver porringer, three old silver tablespoons, three old silver teaspoons marked J.D., two anchor buttons, and my grandmother Cilley's quilt, shall be held in trust by my daughter Alice, each of her brothers and sisters to have with her an equal share of ownership in them."

(2) "After the death of my children, I will that the heirlooms above enumerated go to their issue, if any there should be, and if they leave no issue, said heirlooms shall go to the direct descendants of Emily C. Poole of Hamilton County, Ohio." (Record, Pages 30 and 32). (Numbers ours).

On November 17th, 1901, long prior to the filing of the will contest on May 29th, 1903, J. H. Charles Smith, husband of E, Perlie Smith, one of the three married daughters of the testatrix claiming to have an undivided interest in the land, filed Suit No. 122,-594, seeking a partition of all the land belonging to the testatrix. This case was on the docket until June 2nd, 1903, the day prior to the hearing of the will contest suit, when it became very active.

The will contest was filed by E. Perlie Smith, one of the married daughters, and her husband, J. H. Charles Smith, on May 29th, 1903. A reference to any perpetual calendar will show that this date was on Friday. May 30th, 1903 (Memorial Day) came on Saturday, and Sunday followed and the will contest suit was tried by a jury on Wednesday, June 3rd, 1903, leaving only two days other than Sunday and Holidays between the date of filing the will contest and formality of its actual trial by a jury on June 3rd, 1903.

The docket shows that but one witness testified, viz: E. Perlie Smith, and in addition thereto, under the statutory law of Ohio, a transcript of the proceedings had in the Probate Court, including the evidence of the subscribing witnesses at the time of the probate, was certified by the Clerk of the Probate Court to the Clerk of the Court of Common Pleas.

The named defendants in the will contest case were the six children of the testatrix other than E. Perlie Smith, who was a plaintiff, but including the spouses of those who were married, the three named Executors of the testatrix, John H. Waterhouse, named as Trustee for Mary Bosserman and S. Frances Bedinger, and J. H. Charles Smith, as Trustee for E. Perlie Smith.

There were living at the time of the filing of the will contest, three grandchildren of the testatrix, viz: the plaintiff-appellant in this case, who was born in 1891, a son of Charles H. Waterhouse, a son of the testatrix, and Daniel W. Bedinger, born in 1890 and Hester Bedinger Guard, born in 1898, a son and daughter of S. Frances Bedinger, one of the three

married daughters of the testatrix, all infants under fourteen years of age, but none of them were named as party defendants.

Neither was Alice Waterhouse, as the nominated Trustee for all the heirlooms of the testatrix mentioned on Page 4 of this Petition, named a party to said action.

At the filing of the will contest suit No. 126,311, no praecipe was filed with the petition, nor was any summons issued by the Clerk of the Common Pleas Court of Hamilton County for any named defendant. (Record, page 21).

Instead, what was done was to file a paper signed only by Alice Waterhouse and by counsel (who stated he represented all named defendants), although said paper neither denied or admitted any allegation in the petition in the will contest case. By Stipulation No. 16, Record, Page 21, later made and filed in the District Court on August 9th, 1951, it is shown that the defedant, J. H. Charles Smith as Trustee did not enter his appearance in the will contest.

On June 2, 1903, in Suit No. 122,594, asking partition of all the land belonging to the testatrix, her children filed pleadings in which they claimed an undivided one-seventh each in the real estate belonging to their mother, for the alleged reason that her Will had been set aside on May 28, 1903 (Record, page 13).*

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* Lest it might be thought that the date of May 28, 1903, set out in the above copied excerpt is a typographical error, it is stated that it is not an error, but so appears in the original pleading. We do not state it as a fact, but surmise that the agreement of the children of testatrix to set the Will aside occurred on May 28, 1903. This was obviously the day before the Will contest petition was filed.

On the following day, June 3, 1903, the Will of Hester P. Waterhouse was set aside by the verdict of a jury, and on the same day, (June 3, 1903), a judgment was entered in the partition suit No. 122,594, appointing Commissioners to divide the land of the testatrix (Stipulation 21, Record, Page 22). Thereafter, the Commissioners reported a division, and set off to Mary Bosserman one-seventh interest in the real estate, being the real estate described in the Petition and Amendment filed in this case. The Sheriff of Hamilton County made Deeds to Mary Bosserman and the other children of the testatrix.

A summary of the foregoing stated facts shows that the duly probated Will was purportedly set aside, as follows:

MAY 29, 1903: Petition in Will Contest case filed. The named defendants were (1) all the children of the testatrix, except plaintiff, E. Perlie Smith. (2) the spouses of those named defendants who were married. (3) the three Executors of the testatrix. (4) John H. Waterhouse, Trustee for Mary Bosserman and S. Frances Bedinger, and (5) J. H. Charles Smith, Trustee for E. Perlie Smith.

MAY 29, 1903: The same day as the filing of the will contest, all of the named defendants (except J. H. Charles Smith, Trustee) by Alfred K. Nippert, filed a paper with the clerk signed only by Alice Waterhouse and counsel, which purported to waive the issuance of summons and to enter their appearance, and consent to an immediate hearing, but no allegation made in the contest petition was denied by any of the named defendants.

JUNE 2, 1903: E. Perlie Smith, one of the contestants, filed an Answer and Cross-Petition in Partition Suit No. 122,594, which had been filed by J. H. Charles Smith on November 17, 1901, and on the same day the other six children filed an Answer agreeing with the allegations of E. Perlie Smith's Cross-Petition.

JUNE 3, 1903: Jury trial had. Will purportedly set aside. Motion for New Trial overruled and judgment entered. Also, in the Partition Suit an Order was entered providing for partition of land and appointing Commissioners to make partition.

JUNE 6, 1903: Report of Commissioners filed. Agreed to by all seven children of the testatrix and confirmed by the Court.

In all of the above named proceedings, neither of the three grandchildren of the testatrix (all infants ranging from five to twelve years of age) was made a party, nor was Alice Waterhouse, as the Trustee for all children and grandchildren of the testatrix, for all heirlooms owned by the testatrix.

Consistent with the Court's Order after partition of the real estate of the testatrix was made, as above outlined, deeds were made by the Sheriff of Hamilton County, Ohio, to Mary Bosserman and the other children, and Mary Bosserman entered into possession of the land allotted her and lived thereon until her death on January 26, 1933. Mary Bosserman was the owner in fee of said land, subject only to defeasance by dying previous to her husband, without leaving issue. This is a synopsis of the facts relating to the Will Contest.

Its legal effect will be discussed in the separate briefs filed in support hereof. One brief is filed by attorney Robert Adair Black; the other brief is filed by attorneys John L. Vest and Herbert Barnhorn.

Irma Elsen and Albert J. Elsen filed in the Common Pleas Court of Hamilton, County, Ohio, a Petition against Alice Waterhouse Hughes, the then only surviving child of the testatrix, and all the other heirs at law and devisees of the testatrix, known and unknown, including the plaintiff-appellant and the other two grandchildren of the testatrix. In this suit, No. A-109,226, they claimed to be the owners in fee of two certain tracts of land therein described. The tracts described in said Petition are a part of the land that was set aside to Mary Bosserman in the Partition Suit No. 122,594, above mentioned.

The three grandchildren, of which plaintiff-appellant was one, defended the Elsen-Hughes suit on the ground that they had not been made parties to the will contest, although they were all, at the date of its filing, contingent executory devisees of the land devised by the testatrix to her three married daughters, as set out in the Will of the testatrix relating to the shares of her three married daughters, and that by reason of the failure of the contestants to make them parties, the purported judgment on the Will was, and is, void in any event so far as they are concerned.

The judgment of the Common Pleas Court of Hamilton County, Ohio, was adverse to the three persons who defended the Elsen-Hughes suit, but that Court assigned no reason for its holding. Said three defendants appealed to the Appellate Court for the First

District of Ohio, which sustained the decision of the Common Pleas Court, and its affirming opinion shows clearly the sole basis for its holding in that case. No claim is made in this action to the property claimed by Irma Elsen and Albert J. Elsen, because the title to that tract is res adjudicata, notwithstanding that the ruling of the Court was contrary to the applicable Statutes of Ohio, and inconsistent, but it is apparent that the Appellate Court did not notice that in the so-called Will Contest, no Praecipe was filed, and no Summons issued. An attempt was made by the three grandchildren to appeal the Elsen-Hghes opinion to the Supreme Court of Ohio, but certification was denied. However, this is not an affirmance of the Elsen-Hughes case as decided by the First Appellate District Court.

The Opinion in the Elsen-Hughes case is printed in full on Pages 63 to 65 of the Record filed in the Sixth Circuit Court of Appeals.

The following excerpt from that Opinion on Page 64 of the Record, shows the question which the Ohio Appellate Court regarded as the only issue in the case:

> "The contention of the appellants is that the failure to join them as defendants in the will contest renders the judgment setting aside the Will null and void and that by reason thereof, they now take under said probated Will, notwithstanding the judgment declaring it not to be the Last Will.
>
> The contention of the appellees is that the Trustees, who were parties to the will contest, were the owners of the legal title of the shares of which the daughters were the immediate beneficiaries, and the appellants the remote and contingent

beneficiaries, and that said Trustees were the only necessary party to represent said interest in the will contest, and that it was not necessary to join the beneficiaries, immediate or remote, of such trust."

It is submitted that the record of the will contest in 1903 was not sufficiently brought to the attention of the Ohio Court of Appeals and the Court was not informed of the failures to file Praecipes and to issue summons for the defendants in the Will Case nor that the judgment was entered five days after the Petition to Contest the Will was filed. The Court did rule that the grandchildren were represented by Trustees, although no Trustee was appointed for appellant, then twelve years old, and not a party.

II.

STATEMENT CONCERNING JURISDICTION OF THIS COURT

This action was filed in the District Court for the Southern District of Ohio, on May 26, 1950, and on August 9, 1951, a Stipulation of Facts was had between *all* parties to this appeal which Stipulation contains thirty-three separately numbered paragraphs.

The Stipulation of Facts was agreed upon by the parties to the appeal while in the United States District Court and shows a complete diversity of citizenship and substantially more than $3,000.00 in value in dispute. See Stipulation of Facts, Record, Page 19, Items 2 and 3.

The United States District Court rendered judgment against petitioner-appellant herein, and on appeal to the United States Sixth Circuit Court, the

judgment of the District Court was affirmed as of March 31st, 1953, in Case No. 11,563, but the Circuit Court of Appeals made its final ruling on May 1st, 1953, by entering the following Order in the above styled case: "The Petition for Rehearing is Denied."

The fact that the principal question is very material to the plaintiff-appellant becomes apparent when it is stated that the plaintiff-appellant's whole case is based upon the claim that a certain Will Contest filed in the Common Pleas Court of Hamilton County, Ohio, on May 29, 1903, and tried in that Court by a jury on June 3, 1903, resulted in a VOID JUDGMENT instead of a VALID JUDGMENT, when the adjudicated cases of the Ohio Supreme Court and the adjudications of this, the Supreme Court of the United States, affirming the Ohio Supreme Court, are cited and quoted in the two supporting Briefs.

III.

LEGAL QUESTIONS INVOLVED

There are six questions involved in this Petition. They are:

1. Did the Will Contest Suit No. 126,311 result in VALID or VOID JUDGMENT?
2. Has adverse possession any place in this suit?
3. Has the Ohio Statute of Limitations run against the plaintiff-appellant?
4. Is the case of Elsen v. Hughes, 87 Oh. App. 413, such an adjudicated case as to require the Federal Courts to follow it as an expression of the settled law of Ohio, when considered in connection with other adjudicated cases decided by the Supreme Court of Ohio, both before and since the decision of the Elsen-Hughes case, and also

one case decided by this, the Supreme Court of the United States?

5. Does the failure of the contestants in the will contest to make the three grandchildren of the testatrix parties to that case, render the judgment, if not wholly VOID for other reasons, VOID as to them, as was held in Holt v. Lamb, 17 Oh. St., 374?

6. Violation of Due Process of Law.

There are at least four reasons which we shall contend in our Briefs that render the whole Will Contest proceeding VOID ab initio, as to all parties. They are as follows:

A. When the Petition in the Will Contest Case was filed, no Praecipe was filed and Summons was never issued by the Clerk of the Common Pleas Court of Hamilton County, Ohio, and until Summons is actually issued, NO ACTION IS COMMENCED, and there was no ACTION pending when most but, not all, of the named defendants undertook to enter their appearance.

B. Alice Waterhouse, the named Trustee of all the heirlooms of the testatrix for all of her children and grandchildren, was not made a party in her fiduciary capacity as Trustee.

C. In order that John H. Waterhouse might become a real Trustee in fact for Mary Bosserman and S. Frances Bedinger, and J. H. Charles Smith become a real Trustee for E. Perlie Smith, it was necessary that they hold legal title to the property. The Will expressly provides that, after the division of the real estate has been made by the Executors, the Executors shall make a Deed to each heir, except that

the two Executors shall make a Deed to John H. Waterhouse as Trustee (or to J. H. Charles Smith, appointed for E. Perlie Smith by the Probate Court) but this was never done, because no division was ever made until June 6, 1903, and the judgment in the Will Contest was rendered on June 3rd, 1903, three days prior to any division of the real estate.

The designated Trustees nor either of them, therefore never held a "Trust Res" and were therefore not in reality Trustees.

D. As an alternative proposition of law, if the Trustees were the owners of the legal title to the real estate of their CESTUI QUE TRUSTS, John H. Waterhouse, Trustee for Mary Bosserman and S. Frances Bedinger, and J. H. Charles Smith, Trustee for E. Perlie Smith, then J. H. Charles Smith named as a defendant in the Will Contest Suit as Trustee was never brought before the Court by Summons or otherwise, in his fiduciary capacity. See Stipulation 12, Record, Page 21, where it is said:

> "On May 29, 1903, all the named defendants (except Charles H. Smith, Trustee) by their attorney, Alfred K. Nippert, waived issuance of summons, entered their appearance and consented that the cause be set for immediate hearing."

The first five (5) legal questions stated in this section are all dependent upon the statutory law of Ohio, and the construction which has been given the several applicable sections by the Courts of Ohio to such an extent as to become the settled law of Ohio, and also as construed by this, the Supreme Court of the United States, and its statutory provisions, which we contend both the District Court for the Southern Dis-

trict of Ohio, and the United States Court of Appeals for the Sixth Circuit have ignored.

Finally, as a separate and distinctly different reason, not governed by the laws of Ohio, we insist that the holding by the Appellate Court of Ohio, First District, the holding of the District Court for the Southern District of Ohio, and the Circuit Court of Appeals of the Sixth Circuit all violated the "due process" clauses of the Fifth and Fourteenth Amendment to the Constitution of the United States of America, in holding that the three grandchildren of the testatrix, Hester P. Waterhouse, including your appellant, Charles A. M. Waterhouse, were represented by the Trustees, John H. Waterhouse and J. H. Charles Smith, in the Will Contest filed in the Common Pleas Court of Hamilton County, Ohio, on May 29, 1903, and being numbered on the docket of that Court as No. 126,311.

All these legal questions will be discussed in our two separate Briefs.

Counsel for plaintiff-appellant and the four defendant-appellees, agreed to a Stipulation of Facts, consisting of thirty-three numbered Statements, which Stipulation was filed in the District Court on August 9, 1951, and is printed in full on Pages 19 to 27 of the Record, certified to the Circuit Court of Appeals for the Sixth Circuit, and which is herein referred to in this Petition as the "Record."

By agreement between the parties on the facts, the decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit, with reference to Summary Judgment, becomes strictly a legal question based on undisputed facts.

IV.

REASONS FOR ALLOWANCE OF WRIT

We cite the following reasons for the allowance of the requested Writ of Certiorari:

1. The judgment of the Common Pleas Court of Hamilton County, Ohio, setting aside the Will of Hester P. Waterhouse, is utterly void, but has been held otherwise by an intermediate Ohio State Court. Likewise, the District Court for the Southern District of Ohio, and the Circuit Court of Appeals for the Sixth Circuit have adopted the intermediate Ohio Court's ruling as sound, when as a matter of fact, this Court (the Supreme Court of the United States) has specifically reversed a former decision of the Circuit Court of Appeals for the Sixth Circuit, involving the identical question as is involved in this case, which will be more fully set out in detail in our Briefs.

2. The intermediate Ohio Court's Opinion is likewise in direct conflict with the Statutory Law of Ohio, as construed by the Supreme Court of Ohio.

3. The intermediate Ohio Appellate Court's Opinion has been approved by the Circuit Court of Appeals for the Sixth Circuit, in a way not only probably in conflict with local decisions, but it seems to us contrary to a decision rendered by this, the Supreme Court of the United States, in a case appealed from that Court (the Court of Appeals for the Sixth Circuit) to this Court, and to which decision the attention of the Circuit Court of Appeals has been called, by a Petition for Rehearing, which has been denied. This case will be discussed in our Briefs.

4. The District Court and the Circuit Court of Ap-

peals erred in their holding as to the applicable statutory law of Ohio, as to both Adverse Possession and the application of the Statute of Limitations.

5. The District Court and the Circuit Court of Appeals also followed the Opinion of the intermediate Ohio Court in the case of Elsen v. Hughes, 87 Oh. App. 413, in holding that the plaintiff-appellant is bound by the judgment in the Will Contest Case, although never made a party to said suit, although he was a contingent executory devisee, as to the property devised by the testatrix to her three married daughters, should any one of the three die prior to her husband, without leaving issue, as Mary Bosserman did.

Our claim that the issuance of summons is absolutely necessary to begin an action, was sustained in reference to the requirement of Summons in the case of Rorick v. Devon Syndicate, decided by the Supreme Court of the United States. The Ohio Supreme Court had ruled on the subject of necessity of isssuance of Summons in 1942, before the decision of Elsen v. Hughes and again so ruled in 1951. Both of these cases cited the decision of this, the Supreme Court of the United States in Rorick v. Devon Syndicate, 307 U. S. 299 and approve its reasoning, including the fact that issuance of Summons is absolutely necessary to begin an action in Ohio. This is fully reviewed in our Briefs.

PRAYER OF PETITION

Wherefore, your petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this

Court a full and complete transcript of the Record and of the proceedings of the case in said Circuit Court of Appeals, in the case numbered on its docket as No. 11,563, Charles A. M. Waterhouse, appellant, and Edward Hoover, et al, appellees, to the end that said cause may be considered and determined by this Court, as provided by the Statutes of the United States, and that the judgment herein be reversed by this Court and a judgment in conformity with the Opinion of this Court in the case of Rorick v. Devon Syndicate be directed, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CHARLES A. M. WATERHOUSE,
Petitioner,

vs.

EDWARD HOOVER; EDWARD HOOVER, Trustee of real estate for Charles B. Bosserman and Successors; EDWARD HOOVER, Executor of the Estate of Charles B. Bosserman; MT. HEALTHY FLYING SERVICE, INC., an Ohio corporation of Hamilton County, Ohio, Statutory Agent, Josef B. Rudolf; HOMER S. TOMS; ESTHER P. TOMS; FIFTH-THIRD UNION TRUST CO., of Cincinnati, a corporation under the laws of Ohio; POWEL CROSLEY, JR.; HESTER M. GUARD; DANIEL W. BEDINGER; THOMAS GUARD; ALICE WATERHOUSE HUGHES; MILLICENT WATERHOUSE; MARIE WATERHOUSE; ALICE GRIMM RUDOLF,
Respondents.

PETITIONER'S BRIEF

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, Charles A. M. Waterhouse, respectfully submits that the matters set out herein be considered to the end that a Writ of Certiorari may issue herein to the Sixth Circuit Court of Appeals for a review by this Court of the proceedings had and taken therein, and the opinion therein rendered to the prejudice of your petitioner.

The main issue involved is that a judgment in a statutory proceeding to set aside the will of Hester P. Waterhouse, duly admitted to probate, was void, for the following reasons:

There was no praecipe for summons filed in said action and no summons was issued to any named defendant.

All the necessary parties were not named as defendants, including petitioner-appellant herein.

A stipulation of facts was agreed to by four of the defendants in this action and by the plaintiff-appellant, to be used for the purpose of consideration of motions for summary judgment filed by them in this action, without further proof of facts. The stipulation of facts is printed in the record, pages 19 through 27. Said motions were sustained by the United States District Court and by the United States Court of Appeals, notwithstanding that the Will was adjudicated to be void five days after the petition to set it aside was filed and the minor grandchildren of the testatrix, including plaintiff-appellant, were not made parties to such action, although they were contingent executory devisees under the terms of the Will. The other defendants did not move for summary judgment.

LEGAL QUESTIONS PRESENTED

There are two definitely distinct legal questions involved in this matter:

No. 1:

Did the proceedings in the Will Contest result in a valid or void judgment?

No. 2:

Does the case of Elsen v. Hughes, 87 Oh. App., 413, have any bearing whatever upon the instant case, even to the extent of furnishing any sort of basis for a summary judgment in this case by the District Court for the Southern District of Ohio?

The first question arises from the Statutory Law of Ohio in effect in 1903, when the Will Contest was filed. *Section 5032, Revised Statutes of Ohio,* then read as follows:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing A SUMMONS TO BE ISSUED THEREON." (emphasis ours)

Section 5033 of the same Statutes, then read as follows:

> "The plaintiff shall also file with the clerk of the Court, a praecipe, stating therein the names of the parties to the action; if it be for the recovery of money only, the amount for which the judgment is asked, and DEMANDING THAT A SUMMONS ISSUE." (emphasis ours)

Section 5858 of the same Statutes, then read as follows:

> "A person interested in a will or codicil admitted to probate in the Probate Court, or Court of Common Pleas on appeal, may contest its validity by a civil action in the Common Pleas Court of the County in which such probate was had."

Neither of the above Sections have been altered to this date, although the numbers of the Sections have been changed, and are now respectively *Nos. 11,279, 11,280 and 12,079, Ohio General Code.*

The prime legal question in the Will Contest is: Did the failure of the contestants to file a praecipe for summons with the petition, cause the Clerk of Courts not to issue a Summons upon the named defendants and thus cause the judgment to be void?

It is the Statute Law of Ohio that a praecipe must be filed, so that summons may issue except in proceedings in which service must be made by publication according to Statute.

This legal issue was not raised in the Elsen-Hughes case, as set out at large in the Transcript of the Record, but the District Court held that the issues in the instant case were identical with those presented in Elsen v. Hughes. The Ohio Appellate Court in its opinion states that after the death of the testatrix:

> "An action was duly filed to contest the paper writing as her Will and in due course in that proceeding a judgment was entered declaring the paper writing not to be her Last Will." (Page 63, Record).

It was stated in the cross-petition in Elsen v. Hughes, (Record 47, Exhibit 4), that no summons was issued on the petition in the Will Contest. No reference to this was made by the Ohio Court of Appeals and the failure to file a praecipe for the issuance of summons by the Clerk was not stated to the Ohio Court of Appeals.

State v. *Rhodes*, 158 Oh. St., 128; June 25, 1952. Syllabus (1):

> "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judi-

cial determination, a question not passed upon or raised at the time of the adjudication."

It is stipulated, on Page 21 of the Record, last line, item 16 of stipulation, with regard to the Will Contest:

"There was no praecipe for summons and none was issued."

Without a praecipe and the issuance of summons, *the action was not duly filed* as stated by the Ohio Court of Appeals.

The United States Court of Appeals for the Sixth Circuit stated on Page 3, of its opinion, as follows:

"It was pointed out that while the defendants, including the present appellant, being under twenty-one years of age, had not been made defendants in the action to contest the Will of their grandmother, Mrs. Hester P. Waterhouse, Trustees for them had been parties to the Will Contest."

This recital is not correct. There was no Trust or Trustee for appellant. The Will provided that John H. Waterhouse should receive title to real estate to be conveyed to him, in trust, after partition of the real estate of the testatrix, so as to be held by him for the three married daughters and for their children, if any. However, he did not hold any real estate in trust because none was conveyed to him in trust.

The United States Court of Appeals was clearly and unequivocally advised that no praecipe was filed and that no summons to any party in the Will Contest was issued and it acknowledged, on Page 2 of its opinion, that it was so advised, but nevertheless, it accepted the finding of the United States District

Court that it had been held in Elsen v. Hughes in the State Court of Appeals that the contest of the Will was regular and valid and in conformity with the existing law. Page 2 of opinion of United States Court of Appeals.

The United States Court of Appeals having recited that the District Court adopted the finding of the State Court, which held as quoted by the United States Court of Appeals, that:

> "The judgment setting aside the Will was within the jurisdiction of the Court and cannot be collaterally attacked." (Page 4 of Opinion).

In our Prime Brief in the United States Court of Appeals, Page 22, we stated:

> "A. THE WILL CONTEST WAS A VOID PROCEEDING.
>
> (a) THERE WAS NO SUMMONS, THEREFORE, NO CASE."

The United States Court of Appeals had, as did the District Court, the citations from the Ohio cases decided by the Supreme Court of Ohio, supporting the text of the Ohio Statute, which we have quoted to the Court.

The Ohio Statute provides, in an action to contest a will, as follows:

Section 5859, Revised Statutes, now Sec. 12,080, Ohio General Code:

> "All the devisees, legatees and heirs of the testator, and other interested persons, including the Executor or Administrator, *must* be made parties."

Plaintiff-appellant was not made a party although he held, at the date of the Will Contest, a contingent executory devise in the estate of the testatrix.

We cited to the District Court and to the Court of Appeals, the Ohio Supreme Court cases beginning in 1880 through to 1951, but these Courts accepted the ruling of a State Court of Appeals case involving other property of the decedent herein, where the issue in this case was not raised.

In *Elsen* v. *Hughes,* 87 Ohio Appeals, 413, the issue was not raised that no praecipe for summons was filed and the Court did not pass upon that issue.

In our Prime Brief for the United States Circuit Court, we stated, on page 27:

> "In other words, this was a new point raised by the Stipulation in this case when it was agreed that 'there was no Praecipe for Summons and none was issued', in the Will Contest proceedings. Item 16, Stipulation, Record 21).
>
> If by reason of the failure to file the praecipe and issue Summons the entire Will Contest proceedings are void, we can disregard nearly all of the Opinion in Elsen v. Hughes. In fact only the paragraph of Elsen v. Hughes relative to the Statute of Limitations is germane to the issues herein. (See Opinion, Record 63)."

Near the center of Page 21 of the Record, as a part of stipulation No. 16, relating to failure to file a praecipe and have summons issued in the Will Contest Case, it is there stated as follows:

> "On May 29, 1903, all of the named defendants, (except Charles H. Smith, Trustee), by their attorney, Alfred K. Nippert, waived issuance and service of summons, entered their appearance and

consented that the cause be set for immediate hearing."

J. H. Charles Smith as Trustee for E. Perlie Smith, his wife, could not have been summoned, because no summons was ever issued for any defendant.

In the Will Contest Case, the plaintiff-appellant in this case, was not made a party. He was then twelve years of age. (Record 20). He was the son of a son of the testatrix. The Will provided that the Testamentary Trustee should only hold title to real estate as awarded the three married daughters, Record 32, for their lives and the lives of their children, if any.

EXECUTORY DEVISE

This litigation involves the residuary title to the real estate held by Mary Bosserman during her life. She died childless prior to the death of her husband. The Statute of Limitations against the executory devise accruing to plaintiff-appellant upon the death of Mary Waterhouse Bosserman, has not expired.

Section 11,219; Limitation as to Real Property, is as follows:

> "To recover real estate.—An action to recover the title to or possession of real property, shall be brought within twenty-one years after the cause thereof accrued * * *".

Mary Bosserman died January 26, 1933, but the father of plaintiff-appellant died in 1922, and plaintiff-appellant, his only child, inherited his contingent interest in the real property of Mary Waterhouse Bosserman.

The Will provided, (Page 29 of the Record, Exhibit 1):

> "If either of said three daughters * * * shall not survive her husband and leave no issue, I will that her share of my estate shall be divided into equal parts * * * seven (7) parts to be divided among her surviving brothers and sisters, the children of any deceased brother or sister taking jointly the same share the parent would have taken if then living."

The plaintiff-appellant in this case is the sole issue of his father, who died in 1922, and Mary Bosserman, one of the married daughters, lived until January 26, 1933, and died childless and intestate and prior to the death of her husband. Her life interest terminated on that date.

Charles A. M. Waterhouse acquired an executory devise under the terms of the Will on January 26, 1933, when Mary Bosserman died. The Statute of Limitations did not begin to run until that date and it will not terminate before January 27, 1954.

NO TRUST — NO TRUSTEE

It has been held in the case of *Fulton, Supt. v. Gardiner, et al,* 127 Oh. St., 77 at 80:

> "A trust is a creature of equity. It has a body or *corpus.* You can derive proceeds from a trust fund, but there must be a *corpus* to produce it. If it is nonproductive, and there is a proper charge against it, then so much of the *corpus* must be taken as will respond to the charge. If there is no *corpus,* there is no trust."

The above decision of the Supreme Court was decided in 1933. In 1949, the Appellate Court for the First District of Ohio, in the case of *Madgett* v. *Madgett,* 85 Oh. App., 18 at 23; 87 N. E. 2d, 918 at 922, held:

> "But for a trust to exist, there must be a trust *res*. * * * That a *res* is essential to the existence of a trust is fundamental. 40 Ohio Jurisprudence, 186, Sec. 43. That the *res* must be identifiable as a separate entity, or as a part of an identifiable fund is settled. Barrs, Jr. v. Barrs Rent-A-Car Co., 71 Ohio App., 465; 26 O. O., 378; 50 N. E. 2d, 388. "If there is no corpus, there is no trust.' Fulton Supt. of Banks v. Gardiner, 127 Oh. St., 77."

At the time the pending case had been instituted, none of the trustees referred to, were alive, and there were no other trustees holding any real estate. Neither Charles H. Smith nor John H. Waterhouse ever held title to any property of the testatrix, in trust, as none was ever at any time, conveyed to them.

The real estate referred to had remained in the name of the testatrix after her death and the probate of her Will until the Partition Proceedings instituted by J. H. Charles Smith, who filed a Petition for Partition on November 27, 1901, but his wife, E. Perlie Smith, on June 2, 1903, filed an answer and cross-petition in the Partition Case, claiming a one-seventh (1/7th) interest in the real estate. On June 3, 1903, a statutory partition was ordered, as if Hester P. Waterhouse died intestate and the real property of which Hester P. Waterhouse was seized, was then divided among her seven surviving children, including Mary Bosserman, who received title to one-seventh (1/7th) of her mother's estate. Stipulation 20-21, Pages 22-23, Record.

No trustee at any time ever held title to any real estate of the testatrix, but the recorded title remained as conveyed to the testatrix until partition was con-

cluded, June 3, 1903, stipulation of facts, page 21, item 16, and page 22, item 21. Subsequently a Certificate of Transfer of real estate to Charles B. Bosserman of the real estate of which his wife had been possessed while living was put of record. Plaintiff-appellant was not a party to the statutory partition. Charles B. Bosserman died May 15, 1947.

ALL FACTS ARE STIPULATED

By agreement between the parties on the stipulation of facts, the decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit, with reference to Summary Judgment, became strictly a legal question, based upon undisputed facts. (Record Pages 19 through 27).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

REASON No. 1:

The District Court of the Southern District of Ohio, sustained the defendants' motion for a summary judgment in this case solely upon the authority of the case of Elsen v. Hughes, supra, when, as shown by the opinion of the Court of Appeals of the First Appellate District of Ohio, that in that case the Court failed to note that no Trustee had been appointed as Trustee of any shares and in any case there could be no Trustee to appear for plaintiff-appellant, as he was not a son of a married daughter.

The United States Court of Appeals in its opinion, stated ,with reference to *Elsen* v. *Hughes,* 87 Oh. App., 413-415, that:

> "While the defendants, including the present appellant, being under 21 years of age, had not been

made defendants in the action to contest the Will of Mrs. Hester P. Waterhouse, Trustees for them had been parties to the Will Contest."

This is an erroneous statement with regard to plaintiff-appellant. The Trustees named were to be exclusively limited to the interests of the married daughters and their children, if any.

The Ohio Court of Appeals had held, as quoted by the United States Court of Appeals, Page 3 of the opinion:

> "* * * the trustees who were parties to the will contest were the owners of the legal title of the shares of which the daughters were immediate beneficiaries and the defendants remote and contingent beneficiaries; the trustees were the only necessary party to represent such contingent interest in the will contest; and it was not necessary to join either the immediate or the remote beneficiaries of such trust. The Ohio Court of Appeals then declared: 'It is expressly provided by Section 11,244, General Code, that a trustee of an express trust may bring an action without joining with him the person for whose benefit it is prosecuted * * *".

The Ohio Court of Appeals recited that the grandchildren of the testatrix, not named as defendants in the action to contest the Will, were at that time under 21 years of age. The Ohio Court stated:

> "* * * While it may be that appellants might have been proper parties to the will contest, they were not necessary parties, and their absence did not prevent the Court from entertaining the will contest. * * *". Ex. 10, Page 65, Record.

The Ohio Court stated:

> "The trustee named in the paper writing qualified as trustee of two shares and the Court ap-

pointed a trustee of the other two shares and both trustees were parties to the will contest." Record, Page 64, Ex. 10.

The Trustees did not hold title to any real estate of the testatrix, because no conveyance had been made to them, as directed by the Will. See stipulation, items 16 and 21, record pages 21-22. The issue made in this case that there was no praecipe for summons in the Will Contest, was not an issue in the Elsen-Hughes case. See stipulation of facts, item 16, page 21 of the record.

The Will of Hester P. Waterhouse expressly provided that the named Executors were to partition the real estate for division between her children, but no partition was attempted until after the Will was purportedly set aside in a pro forma hearing on June 3, 1903, of the nominal will contest filed May 29, 1903, without issuance of summons and without reference to appellant herein, then a minor. Had there been a testamentary partition, the Will directed that the several parcels of land be conveyed separately to each of her children, except that the interests of the three married daughters were to be held in trust by a named trustee, to whom the separate tracts were to be conveyed. This was not done, but a statutory partition was had and titles assigned to the several children, following the entry of judgment purporting to set aside the Will.

Had there been partition by the Executors, as the Will directed, then the several parcels of land would have been conveyed to each of her children, except that the interests of the three married daughters would

have been held in trust by the named trustees, to whom the separate tracts were to be conveyed. This was not done, but a statutory partition was had and title purportedly conveyed by deeds executed by the Sheriff of Hamilton County, Ohio, following the entry of judgment purporting to set aside the Will and in accordance with the direction of the statutory commissioners who were appointed by the Court in the partition proceeding, to which plaintiff-appellant was not a party.

REAL ESTATE CONVEYED TO THE ELSENS NOT INVOLVED

The property involved in the case of Elsen v. Hughes related specifically to real estate once the property of the testatrix, and was a part of the real estate allotted to Mary Bosserman under the statutory partition of 1903, agreed upon by the children of Hester P. Waterhouse, after the Will of their mother was recorded as set aside. Charles Bosserman, after the death of his wife, executed a conveyance of part of the estate of his wife to Albert J. Elsen and Irma Elsen. None of this real estate conveyed to the Elsens is involved in this case.

However correct the decision of the Ohio Court of Appeals might be concerning the failure to make the grandchildren of the testatrix parties to the Will Contest and to have a guardian ad litem for them, that decision has no bearing upon the question first raised in this case, namely, that the complete failure to file a praecipe and so cause summons to issue against those named as defendants to the Will Contest created a situation in which no legal action of any kind was

pending in the Common Pleas Court of Hamilton County, Ohio, on May 29, 1903, the date of filing the Will Contest case, or on June 3, 1903 the date of the purported jury trial on which date a motion for new trial was overruled and judgment entered five days after filing the petition.

In addition to Charles A. M. Waterhouse, grandchild of the testatrix, Hester M. Guard and Daniel W. Bedinger are also grandchildren of the testatrix, whose mother, S. Frances Bedinger, died December 25, 1947, and who are interested parties and named as defendant-appellees, together with Thomas Everett Guard, grandson of S. Frances Bedinger and great grandson of the testatrix. By the terms of the Will of S. Frances Bedinger, all her realty was devised to her children, Daniel W. Bedinger and Hester M. Guard, and her grandson, Thomas E. Guard, a minor. The children of S. Frances Bedinger, of course, succeed to their mother's interest in the real estate held by Mary Bosserman during her life.

WAIVER OF SERVICE

Section 5040 of the Ohio Revised Statutes, in force in 1903, and still in force as *Section 11,287, Ohio General Code,* provides a specific method by which a defendant can waive the SERVICE of a SUMMONS after it has once been issued. It reads as follows:

> "5040 R.S. An acknowledgment on the back of the summons or petition, by the party sued, or the voluntary appearance of a defendant, is equivalent to service."

There is no similar statute providing for the WAIVER OF THE ISSUANCE OF SUMMONS.

On the contrary, it is mandatorily provided that in order to begin any civil action (and a Will Contest is a civil action), *the plaintiff must demand summons to issue thereon. Sec. 11,280 O.G.C., Sec. 5033, R.S.*

The complaint herein was filed May 26, 1950, and the stipulation of facts was filed more than a year later, wherein it is stated that all named defendants in the Will Contest case, (except Charles H. Smith, named as Trustee for E. Perlie Smith) by their attorney, waived issuance of summons, entered their appearance, etc. In the stipulation of facts, Smith, Trustee, is definitely omitted from those defendants for whom counsel undertook to waive the issuance of summons or enter their appearance to the Will Contest, although there was no praecipe for summons and none was issued. See: stipulation of facts, item 16, page 21.

NO TRUSTEE FOR APPELLANT

The naming of J. H. Charles Smith as Trustee for E. Perlie Smith, as a defendant, without summons or actual legal entry of appearance having been made by him, does not have the effect to bring him before the Court in his fiduciary capacity, and yet the United States Court of Appeals and the District Court cited and quoted the Ohio Court of Appeals, and all three courts base their entire opinions, so far as the three infant grandchildren are concerned, upon the claim that the two trustees represented all the beneficiaries, both immediate and remote, when neither of them was ever summoned because no praecipe was filed and the Trustees were not "the owners of the legal title of the shares of which the daughters were the immediate beneficiaries," as stated by the United States Court

of Appeals (page 3) because no real estate had been conveyed to them. The opinion of the Ohio Appellate Court held both trustees NECESSARY parties, as the three minor grandchildren were not actual parties, when all three of them were contingent devisees of an interest in at least the shares of Mary Bosserman and E. Perlie Smith, and the plaintiff-appellant was a contingent devisee in the shares of all three of the married daughters.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Reduced to final analysis, there is but one reason for the allowance of the Writ of Certiorari, and that reason is that the Will Contest suit in the Hamilton County, Ohio, Common Pleas Court resulted in a judgment which was VOID instead of VALID.

Madden v. *Shallenberger,* 121 Oh. St., 401, (1929) *Syllabus 3*:

> "Sections 12,079 to 12,087, inclusive, General Code, afford the exclusive mode of setting aside a Last Will and Testament." (Revised Statutes 5858 through 5866).

This statement from the above syllabus is directly applicable to *Section 5859 Revised Statutes,* requiring that all interested persons be made parties, which includes the contingent executory devisees whose interests became determined by the death of Mary Bosserman.

There are at least two reasons why the judgment is void, and they have been set out in detail on pages 2 to 8, inclusive, of this Brief, and are here mentioned only in a summary form as follows:

1. Neither of the three minor grandchildren of the testatrix was made a party to the Will Contest suit.

2. No praecipe was filed with the petition in the Will Contest suit, and no summons was ever caused to be issued for any named defendant.

STIPULATED FACTS

However, in addition to the legal reason set out above, there are stipulated facts which show that the Will Contest was not a real contest. These facts are as follows:

1. The petition in the Will Contest was filed on May 29th, 1903. No praecipe was filed. No summons was issued.

2. On the same day, May 29th, 1903, the attorney for all the named defendants (except J. H. Charles Smith, Trustee) waived the issuance of summons and entered their appearance and consented to an immediate hearing.

3. The case was tried to a jury, with only one witness testifying, viz: E. Perlie Smith. A verdict was rendered against the Will. A motion for new trial was entered and overruled and judgment was entered on June 3rd, 1903, the date of the trial.

It was provided by statute that the answer to a petition shall be filed on or before the third Saturday after the return of the summons or service by publication. The first sentence of *Section 5097, Revised Statutes,* in 1903, was as follows:

> "11,346. Rule Day for Pleadings—The Answer or Demurrer to the Petition shall be filed on or before the third Saturday. * * * * R.S. 5097."

The time for answer or demurrer had not expired on the date of the so-called hearing and judgment.

4. On June 2nd, 1903, E. Perlie Smith filed an answer and cross-petition in the partition suit filed by J. H. Charles Smith on November 19th, 1901, in which she claimed to be the owner of an undivided one-seventh interest in her mother's real estate, and all the children filed an answer to her cross-petition on the same day, and joined in the prayer of her cross-petition. An order of partition was issued on June 3rd, 1903, and thereafter the Commissioners partitioned all the real property of which Hester P. Waterhouse died seized, among her seven surviving children, setting off to Mary Bosserman one-seventh interest therein. Item 21, stipulation, page 22.

5. The testatrix owned real estate in three counties in Ohio, and the Commissioners were appointed to partition on the land on June 6, 1903, and reported such partition on June 6, 1903 and it was confirmed on June 6, 1903.

There can be but a single conclusion from the great number of acts and deeds which were consummated between May 29, 1903, and June 6 1903, and that is, that the purpose was to remove the shares of the three married daughters from the conditions which the testatrix had imposed by her Will.

Reason No. 2:

The statutory provisions of Ohio have been construed by the Supreme Court of Ohio, and approved by this, the Supreme Court of the United States.

As showing the construction placed upon the applicable Statutes, above copied herein, we cite: *Rorick* v.

Devon Syndicate, 307 U. S. 299, et seq. An action in attachment involving failure of service of summons, although issued, it was held that Court had jurisdiction.

The Supreme Court of the United States in *Rorick* v. *Devon Syndicate,* held:

> "AN ACTION is commenced or brought within the meaning of Section 192 and 193, by the filing of a Petition, and causing a SUMMONS to issue thereon. Code Sec. 55." (emphasis ours)

This case refers to and quotes with approval from two previously decided cases from the Supreme Court of Ohio, namely: *Seibert* v. *Switzer* 35 Oh. St., 661, (1880), also an attachment case, where a praecipe for service of summons was not filed. Held: Attachment void, and *Bacher* v. *Shawhan,* 41 Oh. St., 271, (1884) an attachment case where, after a praecipe was filed, summons was returned at "not found". The attachment was held void because issued prior to the issuance of summons.

Later, the Ohio Supreme Court, on March 25, 1942, having the same question under consideration, cited the Rorick-Devon Syndicate case, and again construed the applicable statutory law of Ohio in the case of *Crandall* v. *Irwin,* 139 Oh. St., 463, holding that in accordance with the statutes above quoted, a civil action must be commenced by filing in the office of the clerk of the proper court a petition with praecipe and causing summons to be issued thereon. An attachment served prior to issuance of summons is void.

In the case of *Consumers Plumbing & Heating Supply Co.* v. *Chicago Pottery Co.,* 155 Oh. St., 373,

decided May 9, 1951, it was held that an action is commenced when a petition is filed in the proper court and a summons issued thereon.

THE COURT WAS IN ERROR

The United States Court of Appeals concluded its opinion with the statement that the issues presented in the case at bar were identical with those previously determined by the Court of Appeals of Ohio in Elsen v. Hughes, and that the District Judge properly performed his bounden duty under the mandate of *Erie R.R. Co.* v. *Tompkins,* and the *Statute, U.S.C., Title 28, Section 1652,* in following the decision of the Court of Appeals of Ohio. See page 24 of opinion.

The United States Court of Appeals concluded its opinion with a citation of *Section 1652, U.S.C., Title 28,* which directly states that the laws of the several states shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply.

We have recited for plaintiff-appellant the controlling Statutes of the State of Ohio with reference to the trial of Will Contests constituting a civil action and requiring that devisees and other interested persons must be made parties and requiring further that a civil action be commenced by filing a petition and causing a summons to be issued by filing a praecipe for summons with the Clerk of the Court, which was not done in the Waterhouse Will Contest as required by the Statute Law of Ohio.

Our answer to the United States Circuit Court of Appeals is that the Court of Appeals of Ohio did not

consider or rule upon the failure to issue a praecipe for summons in the Will case, because the judges were unaware of the failure to issue the required praecipe, but assumed and stated in their opinion, that:

> "an action *was duly filed* to contest the paper writing as her Will * * *." Ex. 10, page 63, Record.

This is a misstatement of fact, and an assumption that a praecipe was filed, is apparent.

It is not a misstatement of law, nor is the claim of the Court that plaintiff-appellant had a trustee a statement of law. That statement merely misstates the facts.

The United States Circuit Court of Appeals followed and cited the state case of Elsen v. Hughes in holding that the defendants, including the present appellant, being under twenty-one years of age, had not been made defendants in the action to contest the Will of their grandmother, because Trustees for them were parties to the Will Contest.

The United States Circuit Court further followed the Ohio Court of Appeals in stating:

> "* * * the trustees who were parties to the Will Contest were the owners of the legal title of the shares of which the daughters were immediate beneficiaries and the defendant remote and contingent beneficiaries; the trustee was the only necessary party to represent such contingent interest in the Will Contest; and it was not necessary to join either the immediate or the remote beneficiaries of such trust. * * *". (Opinion, page 3).

This is simply an error of fact, contradicting the

stipulation of facts. (Stipulation, items 16-17, page 21 of the record).

In Ohio, the rulings of reported cases of the Supreme Court are stated in the syllabi.

ALL INTERESTED PERSONS MUST BE PARTIES

Peters v. *Moore,* 154 Oh. St., 177, (1950):

Syllabus 3:

"Under the provisions of Section 12,080, (R.S. 5859), General Code, all the devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator, must be made parties."

Cites and follows *Case* v. *Smith,* 142 Oh. St., 95; *McCord* v. *McCord,* 104 Oh. St., 274, approved and followed. (1922).

Crandell v. *Irvin,* 139 Oh. St., 567. This case, decided in 1942, continues as authority on the time and manner of commencing civil actions by filing a praecipe to direct the clerk to issue summons.

Woodruff v. *Norvill,* 91 Oh. App., 251, (1951), cites and quotes the statutes regularing a Will Contest, including *Section 11,279 (R.S. 5032)*, stating a summons must be caused to be issued.

Syllabus by the Court:

"1. The right to contest a will is statutory, and in the exercise of such right, all conditions imposed by Statute must be complied with."

The case recites that *Draher* v. *Walters,* 130 Oh. St., 92, was reviewed by the Supreme Court in *Peters* v. *Moore,* 154 Oh. St. 177, and overruled. Cites *McVeigh* v. *Fetterman,* 95 Oh. St., 292: Cites and quotes *Peters*

v. *Moore* 154 Oh. St., 177, and *McCord* v. *McCord,* 104 Oh. St., 274.

Case v. *Smith,* 142 Oh. St., 95, (1943):

Syl. 2:

"The provisions of the Statutes relative to an action to contest the validity of a will are mandatory; the enjoyment of the right is dependent upon compliance with the conditions and limitations therein contained."

Syl. 5:

"In such action where none of the heirs-at-law or next of kin is served with summons and no person 'united in interest with them is served within six months from the date of probate there is a failure of compliance with Section 12,080, General Code, specifying who must be made parties, and the Court of Common Pleas is without jurisdiction to entertain such action."

Bynner v. *Jones,* 154 Oh. St., 95, (1950), cites and follows *Peters* v. *Moore.* The Executor was omitted as a defendant in a will contest although served personally. Also cites the following: *Consumers Plumbing & Heating Supply Co.* v. *Chicago Pottery Co.,* 155 Oh. St., 373, (1951). A foreign corporation was sued and attachment levied, after summons was issued on the praecipe. The attachment was held good. *Pilgrim Corp.* v. *Galworthy,* 148 Oh. St., 567; *Crandell* v. *Irvin,* 139 Oh. St., 463, (1942), and *Rorick* v. *Devon Syndicate* 307 U. S., 299.

That the Statute of Limitations does not accrue until after the death of the holder for life, was established in 1867, in *Holt* v. *Lamb,* 17 Oh. St., 374. This case was followed in *McArthur* v. *Scott* 113 U. S. 340,

(1884), which is also a Cincinnati case, and has some resemblance to the case at bar.

Feiler v. *Feiler,* 149 Oh. St., 17, (1948), cites and applies *Holt* v. *Lamb,* (1867), with regard to a devise of real estate to be sold after a fixed period for the termination of a trust.

In *McArthur* v. *Scott,* 113 U. S., 340 at 405, the executors did not defend the will in a contest instituted by the children of the testator and the guardians of the grandchildren stated they would neither admit nor defend the allegations of a bill filed in Chancery by a son of the testator. The Court held as a conclusion, after reciting a long factual statement, that:

> "The record of the decree setting aside the will showed that neither these plaintiffs nor any executors or successors of executors in the trust were parties to the suit; and, consequently, that the plaintiff's title under the will, as originally admitted to probate, was not affected by that decree. * * *
>
> The present suit does not seek to annul or impeach a decree of a State Court granting or refusing probate of a will, but to assert the title of the plaintiffs under a probate granted according to the law of the State, and which by that law stands unaffected, as to them, by the subsequent proceedings between other parties, and conclusively establishes their title."

Webster v. *R. R.,* 78 Oh. St., 87:

> *Syl. 2:*
> "No possession can be deemed adverse to a party who has not at the time the right of entry and possession."

The right of plaintiff-appellant to title did not accrue until 1933 when Mary Bosserman died, without issue. The plaintiff had only a contingent executory devise until the death of Mary Bosserman, and the Statute of Limitations could not begin until 1933, because if Mary Bosserman had survived her husband, appellant would have had no interest on her death. *Carpenter* v. *Denoon,* 29 Oh. St., 379.

CONCLUSION

The Complaint in the pending case was filed May 26, 1950, and the stipulation of facts was agreed to and signed by all the parties to the appeal, and was filed on August 9, 1951, in the United States District Court. It was stipulated that the Will of Hester P. Waterhouse was duly admitted to probate and record on May 31, 1901, by the Probate Court of Hamilton County, Ohio.

It is further stated in the stipulation of facts that E. Perlie Smith and J. H. Charles Smith filed a petition to contest the Will of Hester P. Waterhouse in the Court of Common Pleas of Hamilton County, Ohio, on May 29, 1903. The children of the testatrix and their spouses were named as defendants, along with the Executors of the Estate, and John H. Waterhouse was named as Trustee to whom title had not been conveyed as Trustee. All of the named defendants, except Charles H. Smith, Trustee, by their attorney, Alfred K. Nippert who waived issuance and service of summons and entered their appearance and consented that the case be set for immediate hearing. There was no praecipe for summons for any party, and none was filed nor summons issued.

The petition to contest the Will was filed May 29th, 1901. On June 3rd, 1903, a jury heard one witness: Verdict setting aside the Will. A motion for a new trial was filed and overruled. Judgment was entered June 3rd, 1903, to set the Will aside. Plaintiff-appellant was then twelve years old.

The minor grandchildren of Hester P. Waterhouse were not named as parties, and Charles H. Smith, named as Trustee for E. Perlie Smith, did not enter his appearance.

The Judge of the United States District Court in the separate findings of fact overlooked the fact that the issues in this cause were not the identical issues tried and determined by the Ohio Court of Appeals in the case of Elsen v. Hughes, notwithstanding that the State Courts of Ohio had held that the proceedings in the Will Contest to be regular and valid, because the Ohio Courts were not informed as to the facts of the Will Contest, although the facts were of record as is agreed in the stipulation. The United States Circuit Court of Appeals, although advised that plaintiff-appellant was a necessary party to the Will Contest, and that the adjudication of the United States District Court was invalid, because no summons was issued in the Will Contest case, held that the so-called Trustee was the only necessary party to represent plaintiff-appellant, notwithstanding that the stipulation stated the minor grandchildren were not named as defendants, and plaintiff-appellant was entirely unrepresented.

ROBERT ADAIR BLACK,
Of Counsel for Petitioner-Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CHARLES A. M. WATERHOUSE,
Petitioner,

vs.

EDWARD HOOVER; EDWARD HOOVER, Trustee of real estate for Charles B. Bosserman and Successors; EDWARD HOOVER, Executor of the Estate of Charles B. Bosserman; MT. HEALTHY FLYING SERVICE, INC., an Ohio corporation of Hamilton County, Ohio, Statutory Agent, Josef B. Rudolf; HOMER S. TOMS; ESTHER P. TOMS; FIFTH-THIRD UNION TRUST CO., of Cincinnati, a corporation under the laws of Ohio; POWEL CROSLEY, JR.; HESTER M. GUARD; DANIEL W. BEDINGER; THOMAS GUARD; ALICE WATERHOUSE HUGHES; MILLICENT WATERHOUSE; MARIE WATERHOUSE; ALICE GRIMM RUDOLF,
Respondents.

PETITIONER'S BRIEF

IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRELIMINARY STATEMENT

To the Honorable Judges of the Supreme Court of the United States:

Since January 26, 1933 your petitioner has been the absolute owner of an interest in the real estate described in the Complaint, as amended. This legal title was devised to him by the will of his grandmother, Hester P. Waterhouse.

He has this title, *not from or through* his father (who died in 1922) but *in substitution for* his father; i.e., by *executory devise* from the testatrix *directly* to petitioner as her lineal descendant, upon and by reason of the death of a daughter of testatrix, *childless and survived by her husband.*

This daughter was Mrs. Mary Bosserman, who died on the above mentioned date of January 26, 1933. Her widower, Charles B. Bosserman continued to occupy the real estate alloted to and accepted by his said wife in a division of the family real estate, as arranged by the children of Hester P. Waterhouse.

Said Charles B. Bosserman was a devisee of one-eighth of the particular real estate, by executory devise made by the will of his mother-in-law, just as were the lineal descendants of testatrix the executory devisees of the other seven-eighths.

Charls B. Bosserman died on May 15, 1947 and thereupon Mr. and Mrs. Albert Elsen, claiming as grantees from Charles B. Bosserman of two very small portions of the "Mary Bosserman share" of the Waterhouse family property, brought suit to have their title quieted as against the petitioner herein and other descendants of the testatrix.

Their action resulted in the decision of *Elsen* v. *Hughes,* 87 Oh. App. 413 (by the intermediate court of the State of Ohio), which had been presented to the court upon a certain stipulation and certain exhibits. These exhibits consisted of:

1. The stipulation proper;
2. The original papers in a "faked" contest of the will of said testatrix; and which resulted in a VOID judgment;

3. The original papers in the partition of the real estate of testatrix; and
4. The original papers in the proceedings of administration of the estate of Hester P. Waterhouse.

(Record, page 59)

On May 26, 1950, the within Complaint was filed by your petitioner in the United States Court for the Southern District of Ohio to establish his title to *different* land, as against *different* persons than were parties to the Elsen action. Certain respondents addressed motions to the Complaint and a *new and different* stipulation was prepared and filed in the District Court.

The above described exhibits numbers 2, 3 and 4 were not brought into this stipulation or attached thereto; nor were they reproduced as part of the evidence presented to the State court; they are not in the Record taken to the United States Court of Appeals, in any form or manner. Therefore, *no* federal court judge has ever seen these exhibits or a reproduction thereof.

Notwithstanding this fact, the judge of the District Court "found" that the case stated by the Complaint was identical in *its* facts with the facts presented in the state court. It was obviously impossible for him to make such a "finding".

The issues of law were argued in the District Court. Having only the opinion of the Ohio court to refer to, the District Judge again "found" identity between the two cases. This, too, was an impossibility, as a reading of the following pages of this brief will disclose that

the only two points decided by the State court are predicated upon mistaken concepts of the fundamental (stipulated) facts. The District Judge couldn't know the minds of the judges of the State court, beyond what they explained in their opinion.

The Court of Appeals for the Sixth Circuit affirmed the District Court "in toto", notwithstanding the fact that the District Judge could only have *presumed* identity of facts and of legal issues. Both courts below concluded that the rule in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, barred them from considering any pronouncements by the court of last resort in the State of Ohio (the Supreme Court of Ohio) or a very relevant pronouncement by this United States Supreme Court, or from giving any separate consideration whatsoever to the facts set forth in the Complaint and stipulation filed in the District Court.

Because of the outcome of a solitary case which concerned only the Elsens, both courts below expressly held that the within petitioner can not have "his day in court".

We are in full accord with the decision of this court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, but we expect to show in this brief that the decision in *Elsen* v. *Hughes,* 87 Oh. App. 413, being the decision of an intermediate court of Ohio is:

a. based upon an incorrect statement of facts, and
b. in diametric opposition to and conflict with many decisions of the Supreme Court of Ohio and one decision by this, the Supreme Court of the United States, namely *Rorick* v. *Devon Syndicate,* 307 U. S. 299, wherein this court construed the Ohio statute prescribing how an action is commenced.

This preliminary statement is made to give a general idea of what we expect to show in the remainder of this brief, as is outlined on page 12 et seq. of our petition for certiorari.

This court is familiar with the rule of the Supreme Court of Ohio that the syllabus states the law of the case, rather than the opinion (unless a per curiam opinion be prepared). *Williamson Heater Co.* v. *Radich*, 128 O. S. 124.

JURISDICTION OF THIS COURT

The Complaint was filed on May 26, 1950; in due course it was stipulated that complete diversity of citizenship exists and substantially more than $3,000,00 in value is in dispute. Judgment was entered on November 27, 1951; notice of appeal and bond were filed on December 22, 1951 and the designation of record was filed on December 31, 1951. After orders for extension of time and content of Record and filings, appeal to the Court of Appeals for the Sixth Circuit was completed.

The judgment of the said Court of Appeals was filed and entered of record on March 31, 1953. The Petition for Rehearing was filed in said court on April 20, 1953 and the order of the court thereon was filed and entered by the Clerk on May 1, 1953.

I. THE WILL CONTEST PROCEEDING RESULTED IN A VOID JUDGMENT

(A) NO ACTION UNLESS SUMMONS BE ISSUED, IN OHIO

As stated in our Petition herein, there are four different reasons why the proceedings in the pro forma will contest case filed May 29, 1903, and tried on June 3, 1903, with only two days (other than a holiday and Sunday) intervening, resulted in a VOID judgment, and we shall discuss these several reasons.

The first reason is that upon the filing of the petition in the will contest case, no praecipe was filed and NO SUMMONS was issued, and for that reason alone the purported judgment in that case is a mere nullity.

The applicable statutory laws of Ohio which must determine the question and which were in effect in 1903 are *Sections 5858, 5859, 5032, 5033 and 5040.* They read as follows:

> SECTION 5858: "A person interested in a will or codicil admitted to probate in the Probate Court, or Court of Common Pleas on appeal, MAY CONTEST ITS VALIDITY BY A CIVIL ACTION in the Common Pleas Court of the County in which such probate was had:" (Emphasis ours)
>
> SECTION 5859: "All the devisees, legatees and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties."
>
> SECTION 5032: "A civil action MUST BE COMMENCED by filing in the office of the clerk of the proper court a petition, and causing A SUMMONS TO BE ISSUED THEREON." (Emphasis ours)

SECTION 5033: "The plaintiff SHALL ALSO FILE WITH THE CLERK OF THE COURT A PRAECIPE, stating therein the names of the parties to the action; if it be for the recovery of money only; the amount for which the judgment is asked; and DEMANDING THAT A SUMMONS ISSUE." (Emphasis ours)

SECTION 5040: "An acknowledgment on the back of the summons or petition, by the party sued, or the voluntary appearance of a defendant, is equivalent to service."

These same statutes have been in effect for exactly a century, although the numbering has undergone changes. They are presently numbered and known as *Sections 12,079, 12,080, 11,279, 11,280, and 11,287*, respectively of the *General Code of Ohio.*

That a civil action must be commenced by THE FILING OF A PETITION AND CAUSING SUMMONS TO ISSUE THEREON as set out in *Section 5032* above was made clear by the Supreme Court of Ohio in 1877 in the case of *Bazell* v. *Belcher,* 31 Ohio St. 572. About the middle of page 573 the Court say (per curiam):

". . . The filing of the petition alone does not amount to 'AN ACTION'. The 55th section of the code provides 'A civil action must be commenced by filing in the office of the Clerk of the proper court a petition AND CAUSING A SUMMONS TO ISSUE THEREON". (Emphasis ours)

The Court concludes by holding that no action had ever been commenced; the purported judgment was reversed.

The decision which is most important for a deter-

mination of the case at bar is *Rorick, an Ohio citizen v. Devon Syndicate, Ltd., a Canadian corporation.* The petition was filed in the state court of Ohio on June 19, 1930 and summons thereon was issued immediately by the clerk of such court.

With the petition was filed an affidavit in attachment and garnishment; with said summons was also issued an order for the attachment and garnishment of certain property of Devon Syndicate, located in Ohio. Personal service was never had upon the defendant. Some time after the order for attachment and garnishment had been executed, the first notice of the pendency of the action was published.

This case was transferred to the United States District Court for Northern Ohio. After the dismissal of this case by the District Court, it was appealed to the Sixth Circuit Court. The Appellate Court followed its own previous decision in *Doherty* v. *Cremering,* 83 Fed. 2d 388 and affirmed the District Court's order of dismissal. The Opinion of the Circuit Court is reported in 100 Fed. 2d 844. The action was thereupon heard upon its merits in this Court (the Supreme Court of the United States) by reason of the allowance of a writ of certiorari, and the decision of this Court is reported in vol. *307 U. S. 299.*

By granting certiorari, this Court undertook the task of determining the meaning of the Ohio statute upon which the plaintiff rested his claim of right to maintain the action, viz.:

> "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant . . ."

Section 11,819, Ohio General Code (formerly 5521, Revised Statutes).

Thus the question was squarely presented: What constitutes the commencement of an action in the courts of the State of Ohio?

This Court reviewed the two cases of *Seibert* v. *Switzer,* 35 Ohio St. 661 and *Bacher* v. *Shawhan,* 41 Ohio St. 271 and after quoting *Section* 5032 (now 11,279) supra, proceeds to discuss the facts and law and on page 309 say:

> "The Seibert case and the Bacher case thus seemed to be wholly consistent. An order of attachment issued prior to the filing of a petition and issuance of a summons is void; an order of attachment issued after filing of the petition and the issuance of summons but prior to the commencement of service by publication is valid, though personal service is not had."

It would appear that a reading of this case alone establishes the fact beyond question that no action is commenced in a state court of Ohio until the issuance of summons by the clerk of the court.

But since the decision by this court of the case under discussion, the Supreme Court of Ohio has rendered two additional decisions, in which the Rorick-Devon Syndicate case is approved and followed. These two cases are *Crandall* v. *Irwin,* 139 Oh. St. 463, decided March 25, 1942, and *Consumers Plumbing Co. v. Chicago Pottery Co.,* 155 Oh. St. 373, decided May 9, 1951.

On this question, it is therefore submitted that the will contest action was never in fact actually commenced in the Common Pleas Court of Hamilton

County, Ohio, much less properly prosecuted, and therefore the purported judgment setting aside the will of Hester P. Waterhouse always was and still is a mere nullity.

This Court will observe that the last quoted section of the Ohio statutory law (page 7, supra) provides for a definite method of waiving the SERVICE of summons, once the summons has been issued, but the Ohio legislative body has never provided a similar section for waiving the ISSUANCE of a summons. It is most unlikely that it ever will, for this would practically amount to a legislative attempt to confer jurisdiction by agreement, and such a process is not recognized in any state in the United States, or by the United States itself.

(B) ALICE WATERHOUSE AS TRUSTEE WAS NOT MADE A PARTY DEFENDANT

The next fatal miscalculation of the management of the proceedings in the will contest case of 1903 is the fact that Alice Waterhouse as trustee of all the heirlooms owned by the testatrix for the use and benefit of all the children and grandchildren of the testatrix, as set out on pages 30, 32 of the Record, was not made a party in her fiduciary capacity as trustee.

It was far more essential that the trustee for the heirlooms be made a party, if the theory of the Ohio Appellate Court for the First District be correct, in order that she might represent the grandchildren, than that the two trustees, John H. Waterhouse and J. H. Charles Smith, be made parties, for the same reason.

Based upon the theory adopted by that court (erroneous though it be) the court held that the two

trustees, John H. Waterhouse, Trustee for S. Frances Bedinger and Mary Bosserman and J. H. Charles Smith, Trustee for E. Perlie Smith were the ONLY NECESSARY parties, and represented the beneficiaries under the trust, both the immediate, and REMOTE AND CONTINGENT BENEFICIARIES.

Under the language of the will disposing of the heirlooms, there is no contingency concerning the grandchildren depending upon the death of some person prior to the death of another, but after the death of all of the children of the testatrix, however many grandchildren there might be, the heirlooms went to the group and the only contingency existing is that the grandchildren be living at the date of the death of the last child of testatrix.

The remoteness of acquisition of property rights in the heirlooms was not so remote to the living grandchildren in 1903, as was their likelihood of succession under the executory devise, by the death of one of the married daughters of the testatrix, prior to the death of her husband, and the only thing that can possibly be said against the necessity of Alice Waterhouse, as Trustee of the heirlooms of the testatrix being made a party to the will contest suit is that they might have been of such little value as to be inconsequential.

This would not be a sound basis for omitting Alice Waterhouse in her fiduciary capacity as trustee of said heirlooms as a party to the will contest proceedings. In the case of *The Reformed Presbyterian Church* v. *Nelson,* 35 Ohio St. 638, the fact developed was that David Forsyth had been bequeathed the silver watch of the testatrix; for some reason the said David Forsyth, while made a party to the action to contest

her will, was never served with summons, nor did he waive service of summons.

It was accordingly held by the Supreme Court of Ohio (in 1880) that David Forsyth, being legatee of the watch, was a necessary and indispensable party to the attempted will contest action.

On July 26, 1950 (exactly two months after the filing of the Complaint in the District Court in the case at bar) the Supreme Court of Ohio decided a NEW point of law regarding will contest actions, which is directly applicable to the subject here being discussed, viz.: *Bynner* v. *Jones,* 154 Oh. St. 184.

In a per Curiam Opinion, it is pointed out that one Howard M. Jones, a devisee-legatee was properly described in the body of the petition as the executor, although sued in his individual capacity, only. His answer admitted his fiduciary capacity.

It was held that the failure to make him a defendant in his fiduciary capacity, as well as in his individual capacity, and cause him to be summoned as such fiduciary, within the statutory period, was fatal to the attempt to commence an action.

Even if all persons having an interest in the Waterhouse heirlooms had been made parties, the failure to make Alice Waterhouse as trustee of the heirlooms a party would nevertheless have been a fatal omission. There still would have been no action.

(C) THERE WAS NO TRUST RES; THEREFORE THERE WERE NO TRUSTEES

Another reason why the will contest proceeding was utterly void as to all parties is that in order for John H. Waterhouse to become the trustee for Mary

Bosserman and S. Frances Bedinger and for J. H. Charles Smith to become the trustee for E. Perlie Smith, it was necessary for them to own the legal title to the real estate mentioned in the will for the three married daughters. In the case of *Elsen* v. *Hughes*, 87 Oh. App. 413 it is said by the Court:

> "The contention of the appellees (the Elsens), is that the trustees who were parties to the will contest were the owners of the legal title of the shares of which the daughters were the immediate beneficiaries, and the appellants (the grandchildren of testatrix) the remote and contingent beneficiaries, * * *"

The Ohio Appellate Court sustained this contention, but upon what theory it did not disclose. This holding is diametrically opposed to all language of the will. We need only quote the following excerpt therefrom, as found on page 32 of the Record:

> "Fourth: The executors shall execute to each legatee a deed in fee simple for the real estate to which the legatee may be entitled in said partition. The deed shall be made to SAID TRUSTEE IN TRUST FOR SAID THREE CHILDREN, and he shall have the sole control and management thereof so long as said trusteeship shall last, and SAID DEED SHALL BE MADE BY THE OTHER TWO EXECUTORS TO SAID TRUSTEE." (Emphasis ours)

If the trustee named by the testatrix and the other trustee Smith (appointed by the Probate Court for his wife, E. Perlie Smith) were the owners of the legal title prior to a division, why the need for such specific directions as to WHO should make the deed TO THE TRUSTEE, what provisions should be in it, how long the trust should last, etc.? The entire con-

cept of OWNERSHIP OF THE LEGAL TITLE by the trustees prior to division of the real estate and a later conveyance to the trustee (or trustees) by the other two executors, cannot in our judgment be reconciled, one with the other.

That a "trust res" is necessary in order that a trustee may exist is supported by the following Ohio decisions:

Fulton, Supt. of Banks v. *Gardiner,* 127 Oh. St. 77;
Madget v. *Madget,* 85 Oh. App. 18;
Ohio Jurisprudence, Vol. 40, page 186.

That no conveyance of any kind was ever made to J. H. Waterhouse is stipulated in Stipulation No. 16, page 21, Record, although no stipulation is made concerning J. H. Charles Smith; but this is entirely immaterial, as will be later shown.

It is strikingly strange that the same three judges who wrote the opinion in the case of Madget v. Madget, decided February 21, 1949 (supra), also wrote the opinion in the Elsen v. Hughes case on June 20, 1949, four months later. In the Madget case, they said on page 23, "THAT A RES IS ESSENTIAL TO THE EXISTENCE OF A TRUST IS FUNDAMENTAL", and four months later simply said "that the trustees were the owners of the legal title", in the face of the quoted language from the will, which devises the three married daughters a share equal to each of the other children of the testatrix, and then provides the method of division, and that the shares belonging to the three married daughters shall be put in trust, by a conveyance from the other two executors of her estate.

We therefore assert that the trustees were not at any time, the owners of the legal title to the real estate involved, for no division was made until June 6, 1903, and no conveyance could be made until after the division had been made.

The pretended setting aside of the will on June 3, 1903 forever precluded the possibility of a division's being made of the real estate in the manner provided by the will. In this view of the case, it becomes impossible to accept the reasoning of the judges of the Ohio Court of Appeals and of those who adopt the reasoning of said judges.

(D) IF THERE WERE TRUSTEES HOLDING THE LEGAL TITLES, THEN J. H. CHARLES SMITH AS A TRUSTEE WAS NOT MADE A PARTY DEFENDANT

We ask the privilege of showing the invalidity of the judgment in the will contest case from a standpoint diametrically opposite to the position taken in the immediately preceding discussion.

Suppose we admit that John H. Waterhouse as the trustee for (his sisters) Mrs. Bosserman and Mrs. Bedinger and J. H. Charles Smith as the trustee for (his wife) E. Perlie Smith did own the legal title to the real estate devised to the three married daughters just named. (Such admission is not made, except for the purpose of this discussion.)

By so admitting, we find this condition of the Record:

When the will contest petition was filed, J. H. Charles Smith as Trustee (in his fiduciary capacity) was made a *named* defendant. The court in the Elsen-Hughes case says:

> "The contention of the appellees is that the trustees who were PARTIES TO THE WILL CONTEST etc. . . ." (Emphasis ours).

In the case at bar, however, the parties have agreed upon the Stipulation by which (along with the Complaint) the District Court was limited and bound. By Item 16 (Record, page 21) it is *now* established that:

> "On May 29, 1906 all of the named defendants (except Charles H. Smith, Trustee) by their attorney Alfred K. Nippert, waived issuance and service of summons and entered their appearance and consented that the cause be set for immediate hearing. There was no praecipe for summons and none was issued."

It is true, as stated by the Ohio court, that J. H. Charles Smith was named as a defendant in his fiduciary capacity of Trustee for E. Perlie Smith in the will contest case, but it is also true—as demonstrated by the above quotation from Item 16 of the Stipulation filed in the District Court—that the said J. H. Charles Smith was never summoned in any fiduciary capacity. Nor did he waive or attempt to waive the issuance of summons in said proceeding; nor did he enter or attempt to enter his appearance in any way or manner. He was only a *named* defendant.

In the Elsen-Hughes case, the Ohio Court of Appeals has predicated its conclusion upon the theory that the trustees were the ONLY NECESSARY PARTIES TO THE WILL CONTEST PROCEEDING. Measured by that Opinion, the failure to bring J. H. Charles Smith as Trustee for E. Perlie Smith into the case prevented the existence of an action.

That E. Perlie Smith and her husband J. H. Charles Smith, as individuals, were the plaintiffs in the petition for will contest did not eliminate the absolute necessity of joining J. H. Charles Smith as Trustee for E. Perlie Smith and causing summons to be issued for him as such fiduciary. See *Bynner* v. *Jones,* 154 Ohio St. 184, supra.

II. ADVERSE POSSESSION
and
III. STATUTE OF LIMITATIONS

These two questions, "Adverse Possession" and "Ohio Statute of Limitations", will be discussed together.

They both apply, unless this Court shall grant certiorari and hold that the will of Hester P. Waterhouse has not in fact been legally set aside. If such holding shall be made, then these two questions settle themselves, for the reason that Mary Bosserman died on January 26, 1933, and *Section 11,219 of the General* Code of Ohio (4977, 4978 of Revised Statutes) in force now and in force at all times since the death of Hester P. Waterhouse, reads as follows:

> "An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause thereof accrued * * * ."

The accrual of the cause of action was January 26, 1933, for the reason that the Supreme Court of Ohio held in the case of *Webster* v. *Railroad Co.,* 78 Oh. St. 87, after reviewing its own numerous prior holdings to the same effect, that:

> "No possession can be deemed adverse to a party who has not at the time, the right of entry and possession."

This we understand to be the law of every one of the forty-eight states of the United States, but we are certain that it is the law of Ohio.

IV. IS THE ELSEN-HUGHES CASE BINDING UPON FEDERAL COURTS?

Is the case of *Elsen* v. *Hughes,* 87 Oh. App. 431, when considered in connection with other Ohio decisions of the Supreme Court of the United States and the Supreme Court of Ohio, rendered both before and after its decision, such a case as should be binding upon the federal courts in the case at bar?

As a general proposition, it is admitted that when the jurisdiction of the United States courts attaches to any given case solely by virtue of diversity of citizenship, the "law of the state" is binding upon the federal courts.

But we do not admit, and do not believe, that this court will ever hold that the entire system of courts set up by the United States Government will be compelled to follow *one single case* decided by an intermediate state court, in which the opinion misstates the controlling facts of the case, and makes conclusions of law according to such non-existent "facts".

For the purposes of the case at bar, the ACTUAL facts are stated in the Complaint and the Stipulation of counsel for the parties filed in the District Court on August 9, 1951. Record pages 19 to 27, inclusive.

The Ohio appellate court showed how uninformed

it was with reference to the real facts, when it stated in the opinion, that the trustee appointed by the will was trustee for two shares and the trustee appointed by the Court, represented the other two shares. Record 64 near top of page). There were but three married daughters, and of course there could not be four shares.

Near the bottom of page 63 of the Record the court said that if the paper writing is, as to the grandchildren of testatrix, her last will—

> "then such will would have conferred title upon the named trustee in trust for the daughters during the lives of their respective husbands, *and then in trust for these appellants during their minority, and until they reached twenty-one years of age.*" (Emphasis ours)

The above statement is clearly a misstatement of fact, so far as your petitioner is concerned. The only sentence in the will which even mentions a continuation of the trust beyond the life of any one of the three married daughters appears in the Record on page 29 near the center of the page, and reads thus:

> "If either of said three daughters (naming them) shall not survive her husband *and leave issue, her share shall continue in trust for such issue* until all such issues shall have reached the age of twenty-one years when the trust for such issue shall cease." (Emphasis ours)

It follows therefore, that there is not even a possibility that any trust can ever exist in respect to the estate of the petitioner herein, because he is the only child of Charles F. Waterhouse (deceased 1922) who was a son of the testatrix (Stipulation No. 6, Record

20) (also Stipulation No. 7 in the Ohio state court, Record, page 58).

This fact was made known to the Ohio court by reason of the above stipulation, which was made for the sole purpose of showing that under the terms of the testatrix's will, no trusteeship could ever exist for your petitioner.

Another misstatement of fact appears on the face of the state court's opinion. That court, after stating the contentions of appellees, said (Record, near the center of page 64):

> "The contention of the appellees is that the trustees, who were parties to the will contest, were the owners of the legal title of the shares of which the daughters were the *immediate beneficiaries,* and the appellants the *remote and contingent beneficiaries,* and that said trustees was the only necessary party to represent said interest in the will contest, and that it was not necessary to join the beneficiaries, immediate or remote, of such trust". (Emphasis ours.)

The court adopted the contentions of the appellees as the conclusions of the court and entered judgment accordingly.

In the first place, the trustees *never became the owners of the legal title* to the shares of which the married daughters were the immediate beneficiaries. It has been demonstrated in previous pages of this brief that there was no trust res, and therefore no trust.

In the second place, we submit that it is a palpable misstatement of fact as well as of law to say that any trustee can represent adverse interests in any suit.

By her will, the testatrix created a condition of defeasance of the shares of each of the three married daughters. If this condition of defeasance were removed, the fee simple title of each married daughter would immediately become vested in her absolutely. But simultaneously with the vesting of the fee simple title in each of the three married daughters absolutely, the contingent estate and title of the three grandchildren would become "eo instante" nullified and would cease to exist forever thereafter. It is simply an axiom that this creates a diverse interest between the *immediate beneficiaries* of the testatrix and the *remote and contingent beneficiaries* thereof.

The trustees were appointed for the three married daughters as immediate beneficiaries; the same persons couldn't be, at the same time, representatives of the adverse interest of the remote and contingent beneficiaries of the testatrix, in an action seeking to set aside her will. In this connection, it is more than noteworthy that John H. Waterhouse was *named* defendant in the will contest action as trustee for Mary Bosserman and S. Frances Bedinger; likewise that J. H. Charles Smith was a *named* defendant as trustee for E. Perlie Smith.

Nowhere does it appear that in the 1903 litigation, either of these gentlemen was considered to be a trustee for any executory devisee. This idea is found to have originated in the Elsen-Hughes decision.

So far, we have mentioned only matters of fact. Let us now view some of the palpable errors of law set out in the opinion of the Ohio intermediate court—in addition to those demonstrated elsewhere in this brief under the headings found herein.

We point out these errors, not with the idea of even suggesting that this court "reverse" the Ohio court's decision—no matter how erroneous it be—but solely for the purpose of showing that it is not such a decision as a federal court should be required to follow.

The opinion of the Ohio court is directly at variance with all decisions of the Supreme Court of Ohio and one outstanding decision of this court which we consider directly in point. The case decided by this court is *Rorick* v. *Devon Syndicate,* 307 U. S. 299, which has been emphasized in the Petition for Rehearing. (See Record, page 88). However, the Sixth Circuit Court declined to follow it.

In a very late decision of the Supreme Court of Ohio (June 25, 1952) being the case of *State ex rel* v. *Rhodes,* 158 Oh. St. 128, the first paragraph of the syllabus establishes that:

> "A reported decision, in a case where the question might have been raised is entitled to no consideration whatever as settling, by judicial determination, a question *not passed upon or raised at the time of the adjudication.* (Emphasis ours.)

The only holding in the Elsen-Hughes case is that the respective trustees for the three married daughters were the only necessary parties, so far as the shares of the three married daughters were concerned.

It is true, of course, that the Ohio Court passed upon the questions of adverse possession and statutes of limitations. However, if the court be correct in its holding that the two trustees were the only necessary parties, it follows that such court is also correct concerning adverse possession and the statute of limita-

tions. If the two trustees were the only necessary parties concerning these three shares, and these trustees could properly represent conflicting and adverse interests, then the statute did run from June 3, 1903, the date of the judgment instead of January 26, 1933, the date of the death of Mary Bosserman.

Since the year 1867 when the case of *Holt* v. *Lamb,* 17 Ohio State 374 was decided until July 26, 1950 in the case of *Peters* v. *Moore,* 154 Oh. St. 177, it has been uniformly held by the Supreme Court of Ohio, that the provisions of statutory law governing will contests are mandatory.

The first two paragraphs of the syllabus of the opinion in the Peters-Moore case read as follows:

> 1. "In Ohio the right to contest the validity of a will is statutory."
>
> 2. "The exercise of that right is subject to the conditions imposed by such statutes." (Paragraph one of the syllabus in McVeigh v. Fetterman, 95 Ohio St. 292 and paragraph two of the syllabus in the case of Case v. Smith, Admx., 142 Oh. St. 95, approved and followed).

We refer to the opinion of the Ohio Appellate Court and cite again another quotation. After stating that it is expressly provided by *Section 11,244, General Code,* that a trustee of an express trust may *bring* an action without joining with him the person for whose benefit it is prosecuted, the court says:

> "We find no statutory provision as to *defending* actions involving a trust estate, but it SEEMS to us that the reason for the rule authorizing the trustees to prosecute an action applied with equal force to defending actions. And that SEEMS TO

BE THE RULE IN THE ABSENCE OF ANY STATUTE." (Emphasis ours.)

We admit the truth of the emphasized words, if this were a suit by a stranger to the trust seeking by an action to recover a debt or other thing from the trust estate.

However this is not such an action, but on the contrary, it is a *"will contest"* which is a clash between *remote and potential* devisees under a will whose interests are adverse to *immediate beneficiaries under the same will,* who are also heirs at law if the will be set aside. Therefore THERE IS A STATUTE which determines who must be parties in a will contest action. (*Section 5859 Ohio Revised Statutes now Section 12,080 Ohio General Code,* quoted supra, page 6).

There is one other and last reference which we desire to call to the attention of this court concerning the case of Elsen v. Hughes and that is that in the case of *Sweetland Co.* v. *Evatt,* 139 Oh. St. 6, the Supreme Court decided that its failure to direct a record to be certified from any one of Ohio's co-ordinate Appellate District Courts, means exactly nothing.

The third paragraph of the Syllabus reads as follows:

> "When this court overrules a motion to certify a record (the equivalent of a denial of a petition for writ of Certiorari) no precedent for the decision of later cases by this court is thereby established."

In other words a denial of certification by the Ohio Supreme Court has the same legal effect as a denial of a petition for writ of certiorari by this court.

From the foregoing discussion of the case of *Elsen* v. *Hughes,* 87 Oh. App. 413, we submit that while it is a final judgment binding upon all parties thereto insofar as the direct issues therein involved are concerned, it is so far out of line with the adjudicated cases decided by the Supreme Court of Ohio, both before and after its decision, and so diametrically opposed to the announcement of well established principle of Ohio law set out in the case of *Rorick* v. *Devon Syndicate,* 307 U. S. 299, that it does not rise to the dignity of being the settled law of Ohio, so as to constitute a pattern to be followed by the Federal Courts.

V. WILL CONTEST VOID AS TO GRANDCHILDREN OF TESTATRIX, IN ANY EVENT

We submit that, if all other reasons herein assigned which we claim caused the judgment in the Will Contest case to be totally VOID are not believed by this Court to support our reasoning, we still maintain that it is at least VOID as to the three grandchildren of the testatrix for the following reasons:

A. It was held in the case of *Holt* v. *Lamb,* 17 Oh. St. 374 that those interested in the estate of Sarah Stephenson the testatrix, who were parties to an action setting aside her will, were bound; but as to those interested but who were not parties, the judgment was not binding (upon them) and their rights stood wholly unaffected by the proceeding.

B. In the later case of *McArthur* v. *Scott,* decided by this (the U. S. Supreme Court), March 2, 1885, reported in 113 U. S. 340, this Court discussed the case of Holt v. Lamb, and stated (page 391-2):

> "The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the object of a suit and whose rights will be directly affected by the decree must be made parties to the suit. Exceptions to this rule have been admitted, from considerations of necessity or of paramount convenience, when some of the persons interested are out of the jurisdiction or not in being, or when the persons interested are too numerous to be all brought in. But in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all.'

This is almost the same language as is now contained in *Section 5859, Ohio Revised Statutes* in force in 1903 and copied in full on page 6 of this brief, requiring all interested persons to be made parties.

C. Since the decision of the McArthur case from which the above quotation is taken, the Supreme Court of Ohio decided the case of *McVeigh* v. *Fetterman,* 95 Oh. St. 292 (1917), and Holt v. Lamb is mentioned in the opinion as still being effective.

We have failed to find any case decided by any court in Ohio holding that the rule announced in *Holt* v. *Lamb,* 17 Oh. St. 374, has ever been abrogated.

We see no reason why it should be abrogated, especially when an attempt is made to bind infants by failure to make them parties to a will contest proceeding, where they are definitely interested parties, and to bind them by a proceeding where they were neither parties nor represented by anyone competent to represent them, would be taking from them their contingent rights of succession without that due process contemplated and guaranteed all citizens of the United

States by the Fourteenth Amendment to the Constitution.

We ask only that they may have "Equal Justice Under Law" and be entitled to their day in Court, which we do not believe your Petitioner has had.

VI. VIOLATION OF DUE PROCESS OF LAW

In order to present to this court our claim that if the opinion of the District Court for the Southern District of Ohio and the opinion and judgment of the Court of Appeals for the Sixth Circuit are permitted to stand as now written, a violation of the "Due Process" clause of the Constitution of the United States (Fourteenth Amendment) will be the result, we desire to set forth the rights of your petitioner on the morning of May 29, 1903 before the "will contest" petition was filed and on the afternoon of June 3, 1903, being just five days later, when the so-called will contest ended: so far as these rights arose from the will of his grandmother, Hester P. Waterhouse.

On the morning of May 29, 1903 he was a *"remote and contingent beneficiary"* under her will, to the extent that if the deaths of his father and any one of the three married daughters of the testatrix should occur in a certain sequence, and any one of three married daughters should be survived by her husband but by no issue, your petitioner's status would be changed from that of a *"remote and contingent beneficiary"* (admitted to have existed by both courts mentioned above) to the status of an *immediate* beneficiary of a part of the share of such of the three married daughters as did die in the sequence set forth in the will, survived by a widower but not by issue.

On June 3, 1903 (five days later) under the holdings of both federal courts below, as well as by the ill considered opinion in *Elsen* v. *Hughes,* 87 Oh. App. 413, which both federal courts followed "ad literatum" and almost "ad punctuatum": the interest which he had been devised by the carefully prepared will of his grandmother was now represented by zero. He had nothing. All was gone.

He was, at that time, an infant twelve years of age. He was not made a party by the will contest petition. He had no notice of the filing; he had no opportunity to be heard, either in person or by a guardian ad litem in any orderly proceeding adapted to the nature of the case which took from him every vestige of right and interest in his grandmother's estate. It has been previously shown that even if "trustees" had existed, they could not have represented him.

Was such action by which his entire interest in the testatrix's estate was thus wrested from him in the short period of five days, under the circumstances above stated, "due process"?

We deem it improper to quote from the Fourteenth Amendment. The cases on the "due process" clause of our Constitution are so very numerous that instead of undertaking to "case write" this portion of our brief, we have decided to quote the first sentence of Section 573 under the heading of Constitutional Law of *12 American Jurisprudence, page 267* which reads as follows:

> "573. Essential Elements.—The essential elements of due process of law are notice and opportunity to be heard and to defend in an orderly proceeding

adapted to the nature of the case before a tribunal having jurisdiction of the cause."

The citations under this one sentence cover more than a full page of the volume. We have read these cases decided by this court, but not all cited as state court decisions. The cases decided by this court seem to us to be reduced to their essence by the sentence quoted above.

While there are many legal and literary gems dispersed throughout the various decisions of this court, we were particularly impressed with one paragraph found in the opinion of Mr. Justice Field in the case of *Galpin* v. *Page*, 18 Wallace 350-375, decided in 1873. Near the bottom of page 368 appear these words:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

So far as we know, the above statement has never been challenged or even criticized by any court, either federal or state. We submit that its application to this case is too apparent for discussion.

We make only one other reference to the "due process" proposition. In the case of *Brock* v. *North Carolina*, 344 U. S. 424-428, at page 427, near the bottom of the page of this court's opinion, it is said:

> "As in all cases involving what is or what is not due process, so in this case, no hard and fast rule

> can be laid down. The pattern of due process is picked out of the facts and circumstances of each case."

The above case was decided on February 2, 1953 and is the latest reference of any kind we have found on the "due process" proposition.

While the above was a decision of affirmance, we cite it for the reason that it is in accord with all others, that each case determines for itself whether "due process" has or has not been observed in the proceedings had in that particular case.

If the standard of this rule be applied to the proceedings had, or rather to the proceedings which were not had, in the will contest case filed on May 29, 1903 and terminated on June 3, 1903, we submit that all the essential elements set out in *12 American Jurisprudence 267* (supra) are conspicuous by their absence rather than by their existence, so far as your petitioner is concerned.

If the doctrine of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, when properly understood, is that the federal courts are bound to follow the law *of one case* (no matter how erroneous, in fact and in law it may be) then this court is powerless to grant relief to the petitioner.

But if the federal courts are to follow the law *of the state,* as determined by its highest court (the Supreme Court of Ohio) and the highest federal court (this Court), then, we submit that the order of the Court of Appeals for the Sixth Circuit should be reversed and the petitioner be granted a hearing on the merits of his case.

CONCLUSION

We respectfully but sincerely request that a Writ of Certiorari may issue to the Circuit Court of Appeals of the Sixth Circuit, in order that the Petitioner may further show to this Court, the injustice which he has suffered by the erroneous holding of the several Courts through which he has pressed his claim.

Respectfully submitted,

John L. Vest

Walton, Kentucky,

Herbert Barnhorn

Reading, Ohio,

Of Counsel for Petitioner.

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IN THE

UNITED STATES SUPREME COURT

CHARLES A. M. WATERHOUSE,

Petitioner,

v.

EDWARD HOOVER, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The District Court wrote no opinion but on its own motion made a separate findings of fact and conclusions of law which appear at Page 70 of the transcript of the record. The opinion of the United States Circuit Court of Appeals has not yet been officially reported but appears in the transcript of the record at Page 80.

JURISDICTION

The jurisdictional statements in the petition for writ of certiorari are correct, federal jurisdiction being based exclusively on diversity of citizenship.

STATEMENT OF THE QUESTION PRESENTED

The only question presented in these proceedings is whether the law governing the issue sought to be litigated in the Federal courts has been so determined by the courts

of Ohio as to control the decision of the Federal courts, and thus justify a summary judgment.

STATUTES INVOLVED

U. S. C., Title 28, Section 1652:

> "The laws of the several States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

Hester Waterhouse died in Hamilton County, Ohio, in 1901 possessed of a large amount of real estate. She left a will which was duly probated, but which was later set aside by judgment of the Common Pleas Court of Hamilton County. Following that judgment, her real estate was partitioned by court action among her heirs at law, one of whom was Mary Bosserman. Mrs. Bosserman took possession of her share of the property under a deed in fee simple from the Sheriff of Hamilton County, and she and her successors in title remained in unchallenged possession of the property until 1948.

In that year a Mr. and Mrs. Elsen, purchasers of a portion of the tract from Mr. Bosserman (successor in title to Mary Bosserman) were told that their title was questioned by three grandchildren of Hester Waterhouse upon the ground that the judgment setting aside Mrs. Waterhouse's will was void. The Elsens filed suit to quiet their title; and the grandchildren, including the petitioner in this instant action, filed a cross-petition claiming the judgment in the

will contest to be void and asserting a claim to the property under the will of Hester Waterhouse. The Elsens defended against this claim upon the two grounds: that the proceedings in the will contest were valid; and that if not, the statute of limitations had run against any claim of the grandchildren.

The Court of Appeals for the First Appellate District of Ohio held in *Elsen* v. *Hughes,* 87 O. A. 413 that the statute of limitations had run; and that the proceedings in the will contest were valid. A motion to certify that judgment to the Supreme Court of Ohio was overruled making the decision of the Court of Appeals the decision of a court of last resort in Ohio.

Six or seven months after the Ohio Supreme Court's action on the motion, the petitioner herein filed suit in the United States District Court for the Southern District of Ohio seeking to establish an interest in the *entire* tract originally partitioned off to Mary Bosserman, and raising in his complaint the identical questions that he had raised in his cross-petition in the State court. In an amendment to his petition, he later excluded that portion of the tract that had been conveyed to the Elsens. Motions were filed by various defendants for a summary judgment. Following the filing of a stipulation of facts, the District Court granted the motions for summary judgment upon the ground that the material facts involved in the District Court case were identical with those involved in the State court case, that the Ohio law applicable to those particular and specific facts had been determined, and that the District Court, being compelled to follow the Ohio law, had no duty other than to enter a summary judgment dismissing the complaint.

The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

I

ARGUMENT

The decision of the lower courts was clearly correct.

At the very outset we should like to emphasize that the petitioner, in his two briefs, has devoted himself exclusively to the merits of the two questions of whether the judgment in the will contest of Hester Waterhouse was valid or void, and whether the statute of limitations or adverse possession was operative under the circumstances in this case. Neither of those questions were considered or decided by either of the lower courts, and neither of them will be discussed in any way in respondents' brief.

The lower courts concerned themselves with whether the facts in the instant case were substantially identical with the facts involved in *Elsen* v. *Hughes, supra.* Having determined that the controlling facts were identical, they followed with the conclusion that the determination of the Ohio law applicable to those facts, as made in *Elsen* v. *Hughes, supra,* was controlling on the United States courts; and that therefore the defendants (respondents here) were entitled to a summary judgment.

Upon the question of whether the facts are actually identical, we are content to rely on this quotation from the opinion in the Circuit Court of Appeals (Record Page 81):

> "The record discloses that the origin of title to the property now involved and that involved in the State court case was the same, in that in both cases the title originated from the conveyance of the same tract of land by a single instrument and constitutes a single chain down to the time when various portions of tract were conveyed to various parties."

The sole attack upon this chain of title is based upon the proceedings to contest the will of Hester Waterhouse. There was a single will contest, and the entire records in that case were an exhibit to the stipulation of facts in the State court (Record Page 57, Paragraph 2). The State courts held as a matter of law that those proceedings were valid; and being valid for a portion of the tract, they are valid for the entire tract.

It is further apparent that the facts with reference to adverse possession are identical in the State court case and in the Federal court case. The claim of adverse possession is based upon the Sheriff's deed to Mary Bosserman executed and recorded in 1903 and followed by immediate taking of possession by Mary Bosserman, followed by the continued possession of Mrs. Bosserman and her transferees through a period of more than forty-five years before the filing of court action. The State courts having held that the title of Mary Bosserman and her transferees was protected by adverse possession as to a part of the tract, it follows inevitably that they are similarly protected as to the entire tract.

The petitioners urge that the Ohio courts incorrectly interpreted and applied the Ohio law. The decision in *Elsen* v. *Hughes, supra,* covering a part only of Mary Bosserman's original tract, was not *res adjudicata* as to the remainder of the tract. It was within the right of the petitioner to file action in the Ohio courts as to the remainder of the tract and urge the Ohio courts to change their rulings to conform with the petitioner's interpretation. Instead, he sought to present the merits of his question to a new and different tribunal, the United States District Court. That court correctly held that under the doctrine of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, and the statute, U. S. C. Title 28, Section 1652, it did not lie within the power of the

District Court to say that the Ohio courts had incorrectly interpreted Ohio law with reference to a particular and specific set of facts.

It is perhaps worthy of emphasis that this is not a question of the applicability by analogy of a decision upon one set of facts to a different set of facts. There is involved here the determination by the Ohio courts of the Ohio law applicable to the exactly identical facts here involved.

II

No conflict of decisions is involved.

There is no contention in the petition for writ of certiorari nor in the two briefs filed in support thereof that there is involved here any conflict in Federal decisions, either between the decisions of the lower courts here and of the Supreme Court of the United States nor between the decisions of the lower court and decisions of any other Federal courts. The only contention is that the Ohio courts made a mistake in determining and applying Ohio law.

III

No important question of Federal law is involved.

No actual Federal question is involved in this case beyond the doctrine in *Erie* v. *Tompkins, supra,* and in the subsequently enacted statute (U. S. C. Title 28, Section 1652). Actually the petition for a writ makes no contention that that doctrine was improperly applied or that the statute making the doctrine a matter of statutory law rather than court decision is unconstitutional.

In the lower courts, the petitioner sought to show some distinction in the facts or law between the State action and

the Federal action. The Circuit Court disposed of this effort in the following language:

> "On labored reasoning, appellant seeks to differentiate the instant case from the aforementioned Ohio decision, in which the Supreme Court of Ohio denied a motion to certify and thereby made the judgment of the State Court of Appeals final. The effort to differentiate is in our judgment not well grounded."

It should be noted that in his petition for a writ and in his two briefs, the petitioner has failed to renew the effort.

The petitioner makes some casual claim to being deprived of property without due process, but that claim is based upon the contention that the proceedings in the State court in the will contest were invalid. The Ohio courts have held as a matter of law that those proceedings were not invalid.

CONCLUSION

In conclusion it is submitted that the action of the courts below was eminently correct and that no ground exists for the granting of a writ of certiorari. The petition for that writ should accordingly be denied.

Respectfully submitted,

EDWARD HOOVER,
Attorney for the Respondents.
Edward Hoover; Edward Hoover, Trustee of Real Estate for Charles B. Bosserman and Successors; Edward Hoover, Executor of the Estate of Charles B. Bosserman; and Powel Crosley, Jr.

SEP 23 1953

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 207

CHARLES A. M. WATERHOUSE,
Petitioner,

vs.

EDWARD HOOVER; EDWARD HOOVER, Trustee of real estate for Charles B. Bosserman and Successors; EDWARD HOOVER, Executor of the Estate of Charles B. Bosserman; MT. HEALTHY FLYING SERVICE, INC., an Ohio corporation of Hamilton County, Ohio, Statutory Agent, Josef B. Rudolf; HOMER S. TOMS; ESTHER P. TOMS; FIFTH-THIRD UNION TRUST CO., of Cincinnati, a corporation under the laws of Ohio; POWEL CROSLEY, JR.; HESTER M. GUARD; DANIEL W. BEDINGER; THOMAS GUARD; ALICE WATERHOUSE HUGHES; MILLICENT WATERHOUSE; MARIE WATERHOUSE; ALICE GRIMM RUDOLF,
Respondents.

PETITIONER'S REPLY BRIEF

IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Respondents.

PETITIONER'S REPLY BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner respectfully submits a Reply to the Answer Brief of counsel for the respondents.

Counsel for petitioner have claimed primarily that the so-called judgment in the Will Contest of 1903, was void, because no praecipe was filed with the petition for issue of summons. No summons was issued by the Clerk of the Court of Common Pleas because a

praecipe was not filed with the petition for issuance of summons as required then by Section 5033, Ohio Revised Statutes. See Page 3 of Brief of Robert Adair Black, and Page 7 of Brief of associate counsel. The will contest is reviewed by the writer at Pages 18 to 21 of his Brief and by associate counsel at Pages 6 to 10.

Counsel for respondents claims in his brief that neither the District Court nor the United States Court of Appeals considered whether the judgement in the will contest of the Will of Hester P. Waterhouse was valid or *void,* or whether the Statute of Limitations or adverse possession was operative under the circumstances in this case, and counsel for respondents states in his brief that he would not discuss these questions in his Answer Brief. He did assert, on Page 5 of his Brief, that the continued possession of Mary Bosserman and her transferees extended through a period of forty-five years before the filing of court action. Counsel ignored the uncontested fact that Charles A. M. Waterhouse, petitioner, had no right of possession until the death of Mary Bosserman in 1933.

It was in 1903, as it is now, the law of the state of Ohio that in any court action a praecipe *must* be filed for summons.

It is claimed for the petitioner that the so-called contest of the Will of Hester P. Waterhouse was void, because it was tried five days after the petition was filed to set aside the Will and judgement was entered five days after the petition was filed, although no summons had been issued, as was required by the Statutes of Ohio, to any of the named defendents.

It is also claimed by petitioner that the case of *Elsen* v. *Hughes,* 87 Oh. Ap., 413, had no bearing upon the instant case as a basis for summary judgment in this case, because the Elsen case was tried in the Ohio Courts upon a Stipulation of Facts that differed from the Stipulation of Facts upon which this case was submitted to the District Court and the United States Court of Appeals. Both Stipulations of Facts are printed in the Transcript of Record; the Stipulation for the Federal Courts is at Pages 19 to 27 of the Record as Exhibit 1, and the Stipulation in the Ohio Courts begins at Page 57, being three pages of the Bill of Exceptions in the Ohio case. In the case of *Elsen* v. *Hughes* there was no reference to the failure to file a praecipe for the issue of summons to the named defendants, children of the testatrix. The minor grandchildren of the testatrix were not made parties, although they were contingent executory devisees.

Counsel for respondents make no reference to the contingent executory devise accruing to petitioner after the death of his father in 1922, and the death of Mary B. Bosserman in 1933.

On Page 21 of the Record it is stated in the Stipulation of Facts filed in the District Court, in reference to the Will Contest, as follows:

> "There was no praecipe for summons and none was issued."

It is also stated in the Record, Pages 21-22, that the Will contest was filed on May 29, 1903, and submitted to a jury on June 3, 1903, on which date after hearing one witness, a verdict was entered finding the Will

not to be valid, a Motion for New Trial was overruled and judgment was entered on the same date, finding the document admitted to probate not to be the Last Will of Hester P. Waterhouse.

The legal right of Charles A. M. Waterhouse to succeed to the title of part of the real estate of his grandmother was contingent upon the death of a daughter of the testatrix prior to the death of her husband and without issue, which happened on January 26, 1933. It is not disputed that until such occurrence, petitioner acquired no title to any part of the estate of Mary Bosserman, a daughter and devisee of the testatrix, her mother.

It is true that the State Court of Appeals held in *Elsen* v. *Hughes* in 1949, that the Will Contest was valid. The Stipulation in *Elsen* v. *Hughes* in the Court of Common Pleas, is as follows:

> "A petition was filed to contest the Will in Case No. 126,311 in the Common Pleas Court of Hamilton County, on May 21, 1903. The original papers and the record of procedure in that case are to be considered as Exhibits in this case as though attached to this Stipulation."

The United States Court of Appeals did hold, as quoted in the Brief filed for respondents:

> "* * * The effort to differentiate is in our judgment not well grounded," (Page 7 of Brief).

but the Stipulation of Facts filed in this case recited that in the Will Contest:

> "There was no praecipe for summons and none was issued." (Record, Page 21).

Then follows the recital of the facts in the so-called

Will Contest, Page 21. On the same page of the Record, it is stipulated:

> "The minor grandchildren of Hester P. Waterhouse, including the plaintiff herein, whose parents were then living, were not named as defendants."

It is the law of Ohio that the minor grandchildren were necessary parties to the Will Contest, as they were contingent executory devisees. If an infant is a defendant, he must be served personally and also his guardian or parent. Sec. 5044, Revised States, now 11,291 G. C. The so-called Trustees, referred to by the Ohio Court of Appeals and by the Circuit Court of Appeals, held nothing in trust and therefore they were not Trustees for the minor grandchildren.

The claim of adverse possession is without basis, in reference to the rights of petitioner, as his right was wholly dependent under the terms of the Will that Mary Bosserman die prior to her husband, without issue. The death of Mary Bosserman occurred January 26, 1933, and she died without issue, prior to the death of her husband. Stipulation of Facts, Page 23 of Record, Item 22. The Statute of Limitations has not run out for petitioner.

Charles F. Waterhouse father of petitioner, died in 1922. Record 20, Item 26. After the death of his father, petitioner, Charles A. M. Waterhouse, succeeded to the contingent executory devise provided in the Will of Hester P. Waterhouse. On Page 29 of the Record it is provided in the Will of Hester P. Waterhouse that if any married daughter should not survive her husband and die without issue, the estate

of the married daughter should be equally divided among her surviving children, the children of a deceased child of the testatrix, taking the interest of their parent.

Petitioner did not claim that the Ohio Courts incorrectly interpreted the Ohio Law. He claims that the Ohio Court of Appeals did not correctly state the facts stated in the record of the Will Contest and the United States Court of Appeals was so advised by the Prime Brief filed in the latter court. See Page 7 of Prime Brief filed herein for petitioner by the writer, quoting statement made to the United States Court of Appeals that the failure to file a Praecipe for Summons was a new point, raised in the Stipulation of Facts filed in the District Court. It was not raised at any time in the Ohio case. The Complaint filed in the District Court stated:

> "No summons was issued on said petition to contest the Will, but on the 29th day of May, 1903, a paper reciting the voluntary appearance of the defendants, but signed only by Alice Waterhouse (daughter of the testatrix) and by counsel, who stated he represented all the named defendants, was filed in said proceedings to contest said Will, which paper purported to be an Answer of said named defendants, including all of the surviving children of the testatrix, except the plaintiff, E. Perlie Smith, although said paper neither denied or admitted any allegations of said petition."

The opinion of the Ohio Court of Appeals is Exhibit 10, page 63 of the Record, and the opinion states as to the Will of Hester P. Waterhouse:

> "* * * an action was *duly filed* to contest the paper writing as her Will, and in *due course* in

that proceeding a judgment was entered, declaring the paper writing not to be her Last Will."

It is a statement of fact not brought to the attention of the Ohio Court of Appeals that a praecipe for summons was not filed in the Will Contest. A praecipe must be filed in every case in Ohio.

The Ohio Court of Appeals also stated in its opinion that if the paper writing was the Last Will of Hester P. Waterhouse, then such Will would have conferred title on the named Trustee, in trust, for the daughters during the lives of their husbands.

The Trustee named in the Will did not hold any real estate in trust because the Will, Exhibit 1, on Page 32 of the Record, stated that the Executors should sign deeds in fee simple for the real estate as assigned to each legatee, and specifically that the real estate allotted to the married daughters be transferred by deeds to John P. Waterhouse, as Trustee.

The Stipulation of Facts in the Federal Case states, Page 21, that John H. Waterhouse, to whom title was not conveyed, was named in the Will of Hester P. Waterhouse as Trustee of Mary Bosserman and S. Frances Bedinger. The husband of E. Perlie Smith, named as Trustee for his wife by the Probate Court, held no trust estate.

With reference to the comment of the Circuit Court of Appeals, Page 81 of the Record, on the origin of title of the property now involved, the Executors of the Estate of Hester P. Waterhouse were directed to partition the real estate of the testatrix equally between her children, but to place in trust the real estate allotted to her married daughters. Her children after

obtaining a judgment holding the Will to be void, then partitioned all the real estate and allotted specific portions to all the several children, including Mary Bosserman. The intent in the Will was to assure the retention of the real estate in the Waterhouse blood kin.

Hester P. Waterhouse died on January 12th, 1901, and her Will was admitted to probate May 31st, 1901, and on May 29th, 1903, E. Perlie Smith and her husband, J. H. Charles Smith, filed a Petition for a judgment that such paper writing of Hester P.Waterhouse was not her Last Will and Testament. No praecipe for summons was filed with the Clerk of Court and therefore no summons was issued by the clerk for service upon the named defendants. On May 29th, 1903, a paper writing was filed purporting to be the Answer of the other children of the testatrix to the Petition alleging that the paper writing admitted to probate was not the Last Will of Hester P. Waterhouse. The Answer neither denied nor affirmed the allegations of the Petition, but the jurat was signed by Alice Waterhouse, an unmarried daughter, still living. Alfred K. Nippert signed the Answer as counsel for the named defendants. The Statute of Limitations on the Will Contest ran out on June 1st, 1903, because no summons was issued, but a hearing on the Will Contest was had on June 3rd, 1903, three days after the Statute of Limitations had ended. In the so-called trial, there was one witness, the plaintiff, E. Perlie Smith, but on the same day there was a verdict and a Motion for New Trial and a judgment was entered five days after the filing of the Petition and three days after the limitation by statute, expired.

The assertion in the Brief of Respondents that adverse possession, based upon the Sheriff's Deed to Mary Bosserman gave her and her transferees more than forty-five years of adverse possession, is contrary to the law of Ohio. It has been the law of Ohio for more than a century that no possession can be deemed adverse to a party who has not at the time the right of entry and possession. Case Law cited in the Prime Brief of the writer, page 25. *Webster* v. *R.R.*, 78 Oh. St., 87. The leading case on this rule of law is *Holt* v. *Lamb,* 17 Oh. St., 374 (1867):

> *Syl. 3*:
> "The Statute of Limitations does not begin to run against the children in such case, till after the death of the tenant for life, and no possession prior to his death will bar or affect their right or estate."

The above case was last cited by the Supreme Court of Ohio in the case of *Feiler* v. *Feiler,* 149 Oh. St., 17, (1948), wherein the law as stated in *Holt* v. *Lamb,* supra, is quoted and followed by the Supreme Court of Ohio. There are a number of other decisions supporting and following *Holt* v. *Lamb* in the Case Law of Ohio.

It is true that the Ohio Court of Appeals in their opinion, Record, Page 63, stated an action was *duly filed* to contest the paper writing as her Will.

It is stated in the Stipulation as to the will case, Page 21:

> "There was no praecipe for summons and none was issued."

It is further stated in the Opinion of the Ohio

Court of Appeals in the *Elsen* v. *Hughes* case, Record, Page 64, that there were trustees who qualified as holding shares for the minor grandchildren. Where the Court derived its wholly imaginary idea of *a trustee of two shares* and *another trustee of another two shares* and that both trustees were parties to the Will Contest, can only be explained in that the statement was simply an error of fact. The Court held that such trustees represented the minor grandchildren, although the Will stated that John H. Waterhouse was to hold, in trust, real estate to be conveyed to him by the Executors to be held only for the married daughters or their children until 21 years of age. Page 29, Record.

Section 12,028, G. C., which was in 1903, Sec. 5756, provided a statutory partition, in part, as follows:

> "A person entitled to partition of an estate may file his petition therefor in the Court of Common Pleas, setting forth the nature of his title, a pertinent description of the lands, tenements, or hereditaments of which partition is demanded, and naming such tenant in common, copartner or other person interested therein, as defendants * * *."

The remaining sentence restricts for one year after death, partition of the property of a deceased person.

The partition above referred to was of the land of which Hester P. Waterhouse died seized in 1901, and which was ordered to be partitioned on June 3rd, 1903, the same date as the judgment setting aside the Will of Hester P. Waterhouse.

The learned Judges in the United States Court of Appeals stated in their Opinion:

"* * * the trustees who were parties to the will contest were the owners of the legal title of the shares of which the daughters were immediate beneficiaries and the defendants remote and contingent beneficiaries; the trustee was the only necessary party to represent such contingent interest in the will contest; and it was not necessary to join either the immediate or the remote beneficiaries of such trust * * *."

In our Brief in the United States Court of Appeals, Page 18, we stated that:

"Likewise, the District Court was advised in this case that on the record John H. Waterhouse was not a trustee as there was no trust res, and that under no circumstances was he or could he have been a trustee for Charles A. M. Waterhouse.

Finally, the failure to file a praecipe for the issue of summons was never raised in *Elsen* v. *Hughes,* and consequently was not and could not have been determined in that cause."

We cited to the United States Court of Appeals the decision in *McArthur* v. *Scott,* 113 U. S., 340, an Ohio Will Contest case, in which the Supreme Court of the United States, at Page 391, quoted and copied the Opinion of the Supreme Court of Ohio, in the case of *Holt* v. *Lamb,* 17 Oh. St., 374, decided in 1867, and which is still in the law of Ohio.

In *McArthur* v. *Scott,* this court followed *Holt* v. *Lamb* in holding that in Ohio:

"* * * a decree setting aside a Will was void as against all persons in interest who were not parties to the suit in which it was rendered. * * *"

The Sheriff's Deed of real estate conveyed to Mary Bosserman is not conclusive as to a fee simple title, because under the terms of the Will, if she survived

her husband or had issue of children, then her title would have been absolute, but since she predeceased her husband, without issue, her title terminated at her death, on January 26th, 1933 and the executory devise of the grandchildren became effective.

By agreement between the children of the testatrix, a Partition Suit was instituted as of November 27th. 1901. On June 2nd, 1903, E. Perlie Smith filed an Answer and Cross-Petition, and on June 3rd, 1903, a statutory partition was ordered and the Sheriff of Hamilton County, Ohio, executed a Deed purporting to convey to Mary Bosserman a title in fee simple to her share of the real estate. Stipulation in Record, Pages 22-23.

The District Court on November 27th, 1951, in a separate Finding of Fact and Conclusions of Law held that the Will Contest was regular and valid, conforming to law, notwithstanding the Stipulation of Facts in this case was agreed to by the parties as executed on August 9th, 1951. The Court held that the issues in the instant case with regard to title, the Statute of Limitations and adverse possession barred the claims of plaintiff herein, because of the ruling of the Ohio Court of Appeals in *Elsen* v. *Hughes.*

The decision in *Elsen* v. *Hughes* was based upon mistakes of fact, directly in conflict with the Stipulation of Facts agreed to herein by the parties.

The United States Court of Appeals accepted the holding of the Ohio Court of Appeals in the case of *Elsen* v. *Hughes* and adopted the following statement of the Ohio Court:

"Although it may be that the defendants might have been proper parties to the Will Contest, they were not necessary parties, and their absence did not prevent the Court from entertaining the Will Contest."

Record, Page 83.

The defendants referred to were the grandchildren of the testatrix and not named as parties to the Will Contest.

The United States Court of Appeals also accepted the ruling of the Ohio Court of Appeals that the judgment setting aside the Will was within the jurisdiction of the Court and could not be collaterally attacked.

The United States Court of Appeals in its opinion stressed that a Sheriff's Deed was executed and delivered, in pursance to the final order in a partition case in the Court of Common Pleas. The United States Court of Appeals was fully advised that the minor grandchildren, including the petitioner herein, were not named as defendants, in the will contest, Item 16 of Stipulation, nor were they made parties in the partition proceeding, Item 20 of Stipulation. Partition was ordered on June 3, 1903, the day the Will was held to be void, Item 21. The Sheriff of Hamilton County, Ohio, then executed a Deed purporting to convey a fee simple title to the real estate allotted to Mary Bosserman. This was in 1903, and Mary Bosserman lived to 1933, and then predeceased her husband, without issue. A Certificate of Transfer of real estate to her husband, Charles B. Bosserman, transferring the real estate described in the Petition herein was executed. Charles B. Bosserman during his

lifetime conveyed two parcels of real estate to Albert J. Elsen and Irma Elsen. The grandchildren of the testatrix were defeated in the action brought by the Elsens to clear the title to the real estate transferred to them, because in that case the failure to file a praecipe for summons in the will contest case was not included in the Stipulation of Facts in the case of *Elsen* v. *Hughes.*

The failure to establish jurisdiction of the will contest was not ruled upon by the Court in the case of *Elsen* v. *Hughes.*

The United States Court of Appeals recited the averment of petitioner in their Opinion, Page 80 of the Record:

> "* * * He avers that he was an infant at the time of such will contest and was not made a party defendant, although he had a contingent interest in the estate. He avers further that the adjudication was invalid for the reason that no summons was issued on the petition to contest the will."

We have stated that the Statute of Limitations does not begin to run until the claimant has a right of possession.

The judgment purporting to set aside the Will was not within the jurisdiction of the Court of Common Pleas in 1903, because no praecipe for summons was filed and no summons was issued in the Will Contest case. The Ohio Court of Appeals took for granted that the:

> "* * * action was duly filed to contest the paper writing"

as the Will of Hester P. Waterhouse, and therefore,

"* * * in due course * * * judgment was entered declaring the writing not to be her Last Will."
Record, Page 63.

It is respectfully submitted that the Will Contest was completely fictitious and void; that at that date the petitioner was twelve years old and his father and his father's family had made an agreement to defeat the lawful purpose of their mother for the benefit of the married daughters. Plaintiff had no right of action on his interest as contingent executory devisee until the death of Mary Bosserman in 1933, and the Statute of Limitations had not run when this action was instituted in the United States District Court. It was filed in the United States District Court because the petitioner was not a citizen of Ohio, and he did believe that his legal rights would be respected in that Court.

Respectfully submitted,

ROBERT ADAIR BLACK,
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Cincinnati 2, Ohio,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

CHARLES A. M. WATERHOUSE,
Petitioner,

vs.

EDWARD HOOVER; EDWARD HOOVER, Trustee of real estate for Charles B. Bosserman and Successors; EDWARD HOOVER, Executor of the Estate of Charles B. Bosserman; MT. HEALTHY FLYING SERVICE, INC., an Ohio corporation of Hamilton County, Ohio, Statutory Agent, Josef B. Rudolf; HOMER S. TOMS; ESTHER P. TOMS; FIFTH-THIRD UNION TRUST CO., of Cincinnati, a corporation under the laws of Ohio; POWEL CROSLEY, JR.; HESTER M. GUARD; DANIEL W. BEDINGER; THOMAS GUARD; ALICE WATERHOUSE HUGHES; MILLICENT WATERHOUSE; MARIE WATERHOUSE; ALICE GRIMM RUDOLF,
Respondents.

PETITIONER'S REPLY BRIEF

IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARGUMENT

To the Honorable Judges of the Supreme Court of the United States:

Counsel for respondents invite a short reply brief, by reason of the insertion in their brief opposing certiorari of a few general statements which are calculated to confuse, if not mislead, any one not readily familiar with the ramifications of the many detailed facts involved in this case.

The first sentence of their brief is a sample. It says:

> "The District Court wrote no opinion but on its own motion made a separate findings of fact and conclusions of law which appear at Page 70 of the transcript of the record."

Upon the motions for summary judgment, all of the allegations of the Complaint should have been considered as confessed to be true, unless specifically denied or stipulated to be false.

The stipulation filed in the District Court does not recite the denial by respondents of any single statement in the Complaint. Neither does any sentence of the stipulation indicate that any statement contained in the Complaint is false.

The stipulation, in the main, states facts deemed material by the parties; these facts are in addition to those alleged in the Complaint, even though many facts which are alleged by the Complaint are specifically affirmed by the stipulation.

The most decisive fact which is alleged by the Complaint but which is completely undenied and unmentioned by the stipulation—and which must be taken and considered "pro confesso" for the purpose of the motions for summary judgment—is found on page 13, lines 6 to 17 of the Transcript of Record and reads as follows:

> "The children of Hester P. Waterhouse had agreed among themselves upon the statutory partition, above recited, in which proceeding all of the children other than E. Perlie Smith, filed an Answer on June 2nd, 1903, reciting that the Will of Hester P. Waterhouse had been set aside on May 28th, 1903, and said children in said Answer

> joined in the prayer of the Cross-Petition of E. Perlie Smith and an Order for Partition was issued June 6th, 1903, on which date the commissioners for partition filed the Report of Partition, which had been agreed to by said children and which was duly filed and confirmed on June 6th, 1903."

These same allegations were made in the cross-petition of your petitioner in the *Elsen* v. *Hughes* case (Transcript of Record, page 49, paragraph "F"), but in that case all of the material allegations made by your petitioner—including the allegations set forth in the paragraph last above quoted—were denied by the Reply of the Elsens. (Transcript of Record, p. 52).

The respondents therefore base their argument upon an impossible "finding" by the District Court, which was concurred in by the Circuit Court.

Another sample of the same nature as that just above discussed is found on page 5 of respondents' brief.

The last sentence of grammatical paragraph one (1) on that page reads as follows:

> "The State courts held as a matter of law that those proceedings were valid; and being valid for a portion of the tract, they are valid for the entire tract."

The last sentence of the second grammatical paragraph reads as follows:

> "The State courts having held that the title of Mary Bosserman and her transferees was protected by adverse possession as to a part of the tract, it follows inevitably that they are similarly protected as to the entire tract."

However, the second sentence of grammatical paragraph three (3) on that page reads as follows:

> "The decision in Elsen v. Hughes, supra, covering a part only of Mary Bosserman's original tract, was not res adjudicata as to the remainder of the tract."

This last quotation diametrically denies the two quotations immediately preceding it. We concur in the statement made by this last quotation.

Not only that, but we assert that the *Elsen* v. *Hughes* case is an "orphan" case, wherein the Ohio Court of Appeals should have been guided by and should have followed the decisions in *Rorick* v. *Devon Syndicate,* 307 U. S. 299 and *Crandall* v. *Irwin,* 139 Oh. St. 463, instead of the District Court for Southern Ohio and the Sixth Circuit Court following the *Elsen* v. *Hughes* case.

We have called the *Elsen* v. *Hughes* opinion an "orphan". Our reason for so doing is that it is in direct conflict with every case decided by the Supreme Court of Ohio, both before and after its rendition. Furthermore, it is in direct conflict with the carefully considered decision in *Rorick* v. *Devon Syndicate,* 307 U. S. 299 (by this court), which case involved the same basic question of law as the present case.

This court can not fail to note that in respondents' brief not a single case is cited except the *Elsen* v. *Hughes* case and the *Erie Railroad* case. With the latter decision we are, and at all times have been, in hearty agreement.

The only difference between counsel for respondents and ourselves concerning the *Erie Railroad* case is

that we contend that a "state court" decision to be followed by the federal courts must be expressive and representative of the "law of the state" and not an "orphan" decision, which prescribes the law of a particular case, only.

CONCLUSION

We conclude by stating that our motive for bringing this action in a federal tribunal has been questioned. We assert that if respondents concede that we had the right to bring an action at all, then we had the right to select the tribunal in which the action was to be brought.

Our motive having been questioned, we adopt a quotation from an opinion of this court in the case of *Pease* v. *Peck*, 59 U. S. 595-601, decided May 14, 1856 but which still stands unchallenged by any court, either state or federal, so far as we can find.

That quotation (page 599) is as follows:

> "Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."

Respectfully submitted,

JOHN L. VEST,
HERBERT BARNHORN,
Of Counsel for Petitioner.